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1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK

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ADREA, LLC,

Plaintiff,

v.

13 Cv. 4137 (JSR)

BARNES & NOBLE, INC.,
BARNESANDNOBLE.COM LLC, AND
NOOK MEDIA LLC,

Defendants.

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October 7, 2014
10:00 a.m.

Before:

HON. JED S. RAKOFF

District Judge

APPEARANCES

PROSKAUER ROSE LLP
Attorneys for Plaintiff
BY: STEVEN M. BAUER
COLIN CABRAL
BRENDAN COX

ARNOLD & PORTER LLP
Attorneys for Defendants
BY: LOUIS S. EDERER
ALI R. SHARIFAHMADIAN
MICHAEL A. BERTA
YUE-HAN CHOW

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1 (Case called)

2 THE DEPUTY CLERK: Will the parties please identify
3 themselves for the record?

4 MR. BAUER: Good morning, your Honor. Steve Bauer
5 from Proskauer for plaintiff ADREA. We have our team here if
6 you want everybody to identify themselves.

7 THE COURT: No, that's all right. Thank you.

8 MR. EDERER: Good morning, your Honor. Louis Ederer
9 from Arnold & Porter, and I too have a team.

10 THE COURT: I am extremely sorry for the delay.

11 First, any witnesses who are present in the courtroom
12 are excluded as of right this moment, including experts. They
13 should wait in the witness room, and that will continue
14 throughout trial.

15 MR. CABRAL: Your Honor, our client representative is
16 named on defendants' witness list.

17 THE COURT: One client representative per side can
18 remain at counsel table.

19 MR. CABRAL: Thank you, your Honor.

20 THE COURT: Second, the redactions in the proposed
21 pretrial consent order, which were submitted with the Court's
22 permission, but now that I have seen the redactions I think
23 there is no good reason to redact any of that information. So
24 the Court will file the unredacted copy in the public record.

25 Third, as you, I believe, already know from my

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1 individual rules and our discussions on the phone, no witness
2 will be called twice. Of the eleven witnesses listed on
3 plaintiff's list of witnesses, eight are also listed on
4 defendants' list of witnesses. If for any reason plaintiff
5 doesn't call any of those folks, defendant may, but none of
6 those witnesses will be received by deposition.

7 Next, with respect to the motions in limine, we will
8 begin with the plaintiff's motions.

9 MR. CABRAL: If I may address the Court. On two of
10 the plaintiff's motions, the parties have reached agreement
11 that would obviate the need --

12 THE COURT: When we get to them, tell me which they
13 are.

14 The first motion is to preclude arguments and
15 testimony inconsistent with the Court's claim construction.
16 Both sides of course say they totally are consistent with the
17 Court's claim construction, but they disagree as to what that
18 consistency consists of. That motion is denied as premature.
19 We will see what happens. If someone attempts to say something
20 that is in fact inconsistent with the Court's claim
21 construction, an objection can be raised, and I will deal with
22 it then. If it is in fact inconsistent with the Court's claim
23 construction, the Court will take appropriate action, like
24 telling the jury this is totally inconsistent with the law.

25 Second, the motion to preclude evidence or arguments

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1 as to when the asserted patents were recorded with the U.S.
2 Patent Office, that has been resolved and is moot.

3 MR. CABRAL: That's correct.

4 THE COURT: Third, the motion to preclude expert
5 testimony on matters outside the scope of the expert reports,
6 that motion does not specify any specific evidence that the
7 plaintiff expects will be offered in that regard. So the
8 motion is denied for now without prejudice to being renewed
9 when in fact some such testimony is offered, if it ever is.

10 Fourth, the motion to preclude use of pejorative,
11 derogatory, or otherwise inflammatory terms to characterize
12 ADREA or its patent, such as patent troll, that motion is
13 granted in the sense of, I don't want to hear a reference to a
14 patent troll, but that doesn't mean that it may not become
15 relevant to describe the structure of plaintiff's business. We
16 will have to take that up on an item-by-item basis.

17 Fifth, the motion to preclude opinions in Mr. Neuman's
18 supplemental report that relate to questions of law, I will
19 take this up at the *Daubert* hearing on Friday.

20 Sixth, the motion to preclude Neuman from testifying
21 that the Gifford and Sachs prior art references anticipated the
22 asserted claims, I will come back to this one in a minute.

23 Seventh, the motion to exclude evidence of unaccused
24 modes of operation and configurations of the lending process,
25 this again is appropriately taken up at the *Daubert* hearing on

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1 Friday.

2 Eighth, the motion to preclude the testimony of Vrinda
3 Mushran, this motion is moot.

4 Ninth, the motion to preclude reference to this
5 Court's rulings on summary judgment, that motion I think can't
6 be decided in the abstract. If someone wants to raise this,
7 they need to approach the sidebar at the appropriate time, and
8 we will deal with it then. I am inclined, but this is not
9 final, to deny the motion as to the Court's holding that the
10 Nook applications were noninfringing and that the e-content was
11 not infringing, but grant the motion as to any argument that
12 the Court's summary judgment opinions bear on the issue of
13 willful infringement, but I will hear further argument at the
14 sidebar if and when this comes up. There will be no reference
15 to that in the opening statements.

16 With respect to the defendants' endless motions in
17 limine, with respect to motion 1(a), to preclude the doctrine
18 of equivalents arguments regarding the single-user-input
19 limitation of claim 13 of the '703 patent or the
20 selects-a-title limitation of claim 96 of the '851 patent, my
21 understanding is that motion is moot.

22 With respect to 1(b), to preclude the doctrine of
23 equivalent arguments regarding the associated limitation of
24 claim 7 and 18 of the '501 patent, I will hear argument on that
25 in a few minutes, but I don't really understand that motion

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1 because this was under the subheading of expert opinions not
2 disclosed in discovery, but that opinion was disclosed in
3 discovery. I think the objection seems to be rather on grounds
4 of prosecution history estoppel, but we will discuss that in a
5 minute.

6 1(c), to preclude evidence on the reverse engineering
7 allegedly conducted by Mr. Berg and the source codes allegedly
8 generated but never provided to Barnes & Noble and alleged
9 device logs attached to his report on which he never relied,
10 the motion is moot as to reverse engineering and source code,
11 the motion is denied as to the device logs.

12 MR. BERTA: I don't mean to interrupt. I just wanted
13 to let you know we have reached agreement on the second part of
14 that.

15 THE COURT: What is the agreement?

16 MR. BERTA: They are not going to introduce the device
17 logs.

18 THE COURT: Very good. Thank you.

19 With respect to 1(d), to preclude evidence that prior
20 art references do not disclose or render obvious any
21 limitations not addressed by Wang during discovery, this motion
22 is moot as to any argument or evidence presented to the jury.
23 If it's still a live issue at summation, counsel may renew its
24 objection before summations are given.

25 With respect to 1(e), to preclude ADREA from

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1 presenting any new patent royalty rate, that motion is moot.

2 With respect to 2(a), to preclude evidence regarding
3 Barnes & Noble's source code production, that motion is
4 granted.

5 With respect to 2(b), to preclude evidence or argument
6 that Barnes & Noble received actual notice of patents-in-suit
7 prior to March 29, 2012, that motion is moot.

8 With respect to 2(c), to preclude evidence or
9 arguments related to willfulness, that evidence or arguments
10 were not identified during discovery, I will hear argument on
11 that in a few minutes.

12 MR. BERTA: On that one we have reached agreement as
13 well.

14 THE COURT: Very good.

15 On 2(d), to preclude argument that Barnes & Noble's
16 lack of reliance on opinion of counsel has any relevance to
17 willfulness, that motion is moot as to any argument, except
18 possibly an argument regarding willfulness or enhancement of
19 damages, but we will take that up if and when it arises. So
20 for now it's denied as premature.

21 With respect to 2(e), to preclude ADREA from relying
22 on Barnes & Noble's technology licenses, that motion is denied.

23 With respect to 2(f), to preclude evidence of Barnes &
24 Noble's e-content and accessory sales, that motion is granted
25 as to revenue from sales made from other than the accused

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1 devices, but is otherwise denied.

2 With respect to 2(g), to preclude evidence of
3 functions that have not been accused for the purpose of
4 bolstering damages, that motion is granted.

5 With respect to 2(h), to preclude testimony by Talal
6 Shamoon regarding the audio and video codec industry, or
7 alleged similarities of that technology to the technology in
8 this case, that motion is granted.

9 With respect to 2(i), to exclude the 2009 Intertrust
10 analysis, that motion is granted.

11 With respect to 2(j), to preclude ADREA's expert from
12 presenting his "artificially high damage amounts," and from
13 presenting any amount with respect to any patent that he
14 calculated based on unit sales that postdate the patent's
15 expiration, we will take that up at the *Daubert* hearing.

16 With respect to 2(k), to preclude ADREA from calling
17 B&N's attorneys to testify at trial, that motion is moot.

18 With respect to the motion to preclude evidence
19 concerning B&N's revenues, profits and investments, I will take
20 that up at the *Daubert* hearing, although I am leaning towards
21 granting that motion.

22 And, finally, with respect to motion number 3, to
23 preclude Berg's expert reports and exhibits as inadmissible
24 hearsay --

25 MR. CABRAL: On this one, the parties have also

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1 reached agreement.

2 THE COURT: OK. Very good.

3 MR. CABRAL: Can we ask one question for
4 clarification?

5 THE COURT: Yes.

6 MR. CABRAL: Your ruling with regard to motion in
7 limine 2(i), is it correct that that is limited to Intertrust
8 analysis?

9 THE COURT: Yes.

10 MR. CABRAL: Thank you.

11 THE COURT: All these rulings are subject to the
12 exception that if any party opens the door to something that I
13 have excluded, then of course the matter will have to be
14 reconsidered at that time.

15 MR. BERTA: On their motion number 6 that you said you
16 may want to hear about, which is Gifford and Sachs?

17 THE COURT: Pardon?

18 MR. BERTA: The Gifford and Sachs motion on
19 anticipation, we are not going to rely on Gifford, the Gifford
20 system as anticipatory. So I think that that should resolve
21 that issue. And with respect to Sachs, while we think the
22 system as described in both patents is anticipatory, we are
23 going to rely on the patent that is cited in his report.

24 THE COURT: So that motion is moot too.

25 So I think other than the ones that I reserved on

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1 either to the *Daubert* hearing or until the matter is raised in
2 some specific question or proffer, I think the only open one
3 then was 1(b), which, as I said, I didn't really understand.
4 It was under the heading of expert opinions not disclosed in
5 discovery, but it was disclosed in discovery.

6 MR. BERTA: Yes.

7 THE COURT: So are you still pursuing that argument
8 nevertheless on other grounds?

9 MR. BERTA: I think it was inartfully worded.

10 THE COURT: Or, as some might say, wrongfully.

11 MR. BERTA: Maybe.

12 THE COURT: Was it disclosed in discovery?

13 MR. BERTA: It's not whether the DOE argument itself
14 was disclosed. That was definitely disclosed in discovery.
15 What was not disclosed in discovery is any opinion or other
16 evidence on whether or not they can overcome the presumption of
17 prosecution history estoppel. They just make an attorney
18 argument about what they think the references say. It's their
19 burden to overcome prosecution history estoppel because it is
20 an amendment to the actual language. They have no opinion on
21 that issue or any purpose. So that's what is missing from the
22 expert report. So they can't make an argument that they
23 overcome the burden of prosecution history estoppel.
24 Therefore, the DOE argument itself, which was disclosed, should
25 be out.

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1 THE COURT: I adhere to what I said a few moments ago.
2 I think it's not that the opinion was not disclosed in
3 discovery; it's that you are arguing that the opinion should be
4 precluded because of a failure to overcome prosecution history
5 estoppel. But let's not quibble. Let's hear from your
6 adversary.

7 MR. CABRAL: This argument was addressed fully in our
8 summary judgment briefing. This Court denied Barnes & Noble's
9 argument, the motion for summary judgment, on the grounds that
10 there was no prosecution history estoppel.

11 THE COURT: You are going to need to speak a little
12 louder.

13 MR. CABRAL: This is essentially rehashed in the
14 summary judgment argument.

15 THE COURT: I heard that part. I just didn't hear the
16 very last word you said.

17 MR. CABRAL: The law is clear that motions in limine
18 are not to be used to reargue the issues that have been
19 resolved by this court.

20 THE COURT: But just remind me because I haven't gone
21 back and looked at the summary judgment in this respect. They
22 say that you didn't offer any evidence to overcome prosecution
23 history estoppel. So was there prosecution history estoppel
24 and you did offer evidence, or are you saying there wasn't
25 prosecution history estoppel?

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1 MR. CABRAL: There was not prosecution history
2 estoppel.

3 THE COURT: Because?

4 MR. CABRAL: Because the amendment at issue related to
5 a time parameter associated with a Pay-Per-View television
6 program. So, in other words, if the program were the Nightly
7 News, that parameter would be 6 p.m., because that's when the
8 Nightly News came on. The claims were then amended to add a
9 predetermined time period. So to add the lend-in period that
10 is now the element that's in the claims. That was to overcome
11 prior art. The prior art related to just any time parameter
12 associated with any program. So, essentially, the amendment
13 was the introduction of the lending period from the beginning.

14 Now, here, the doctrine of equivalents argument, the
15 equivalent doesn't relate to the lend necessarily; it relates
16 to the precise starting point for the lend period. In other
17 words, the dispute in this case is over one or two seconds. If
18 the lending period starts at second one, they say they don't
19 infringe. If it starts at second two, we say they do. Because
20 there is no substantial difference in a 14-day lending period
21 based on a one- or two-second difference. That's essentially
22 the issue in the case. The equivalency that we are arguing and
23 relying on here has no bearing or relation to the amendment or
24 introduction of the lending period itself.

25 THE COURT: Let me hear from your adversary.

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1 MR. BERTA: The words as they were in the patent --

2 THE COURT: Remind me because, as I say, I didn't go
3 back. Was this raised in summary judgment?

4 MR. BERTA: Yes.

5 THE COURT: I ruled against you.

6 MR. BERTA: You ruled on all the rest of the issues
7 that there were questions of fact, that's correct.

8 To respond to that point, the issue of specifically
9 prosecution history estoppel is a question of law for the Court
10 to decide. The reason we are bringing this forward in an MIL
11 is because, if they were never able to run a DOE argument, it's
12 going to be highly prejudicial for the jury to hear how it
13 doesn't really matter one second or no seconds, an argument
14 that the jury could confuse with the question of literal
15 infringement. Because they are not going to know that when he
16 says one second, that doesn't mean I can decide it literally
17 infringes. There is no question that we can't literally
18 infringe. We believe we can't literally infringe because there
19 is a different time period, one starts earlier than the other.

20 So running DOE at all will be prejudicial in front of
21 the jury if they were not allowed to do it. I believe we lost
22 on doctrine of equivalents at summary judgment, but the
23 question whether or not they are allowed to run it as an
24 initial matter has to be decided. So we are trying to figure
25 out how to get that issue teed up, because I do think the

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1 prejudice here arises from running a DOE argument that they
2 were not able to run infecting the literal infringement
3 argument.

4 THE COURT: All right.

5 MR. BERTA: So with respect to the issues, what the
6 claim language said previously was associating a time parameter
7 with the electronic book. He says there was no time duration,
8 and so the amendment added a time duration, but that's not what
9 the language said. The language said associating a time
10 parameter. So there was a time duration associated with the
11 book prior to the amendment.

12 THE COURT: I understand now the arguments from both
13 sides. I need to go back and both look at the summary judgment
14 and also to think about the arguments you have just raised. I
15 assume this is not a matter that is going to come up in opening
16 statement. So I will resolve it by lunchtime.

17 All right. I think we are ready to call the jury
18 panel up, unless counsel has anything else they need to raise
19 with the Court at this time.

20 MR. CABRAL: There are a couple of matters that we
21 talked with the other side about.

22 THE COURT: OK.

23 MR. BAUER: Excuse me, your Honor. I am losing my
24 voice. Worst thing for a lawyer.

25 We would like to know your views on playing the patent

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1 video that the Federal Judicial Center puts out. We would like
2 to play that for the jury; they have opposed. There are three
3 pieces to this. We think the jury should know something about
4 patents, whether it's the video. We have also suggested
5 putting the patents in a notebook so the jury would have the
6 three patents. They have objected. And they have objected to
7 a couple of our slides, your Honor, if I could just show you
8 from the opening.

9 Those are the two questions. It's really your style,
10 but whether you would be open to playing the patent video.

11 THE COURT: I am open to playing that, but I think we
12 need to get the jury selected, and we can discuss that some
13 more. But real quickly, what is the objection?

14 MR. EDERER: We proposed some preliminary instructions
15 to the jury that deal with the issue of patents and how the
16 patent system works and so forth. That's a 20-minute video,
17 the first 15 or 17 minutes of which are how hard the patent
18 office works to examine the patents. Then in the last minute
19 or two --

20 THE COURT: There is some of that. I am familiar with
21 the video. I know I asked for it. Did I receive your
22 preliminary instructions?

23 MR. EDERER: That was part of the proposed jury
24 charges, your Honor.

25 THE COURT: There it is. I will take a look at that.

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1 We will talk about this a little bit more, but during
2 the break, while we are bringing the jury panel up, I will take
3 a quick look at that video. Actually, I think defense counsel
4 may be right. It's not really not more than of passing
5 relevance here, if at all, which is the wonderful work that the
6 patent and trademark office does, which would not be a subject
7 the Court would care to comment about.

8 MR. BERTA: Very briefly. We have two issues. One
9 with respect to the witness order. There are some changes to
10 which we are objecting and one with respect to the way
11 witnesses are coming in, whether by individual or video. Do
12 you want to wait until we get the jury here?

13 THE COURT: Yes.

14 MR. BERTA: The other issue is Amazon is here with
15 respect to their confidential information as well.

16 THE COURT: Well, they will just have to wait until we
17 pick the jury too.

18 MR. CABRAL: One final issue. With regard to one
19 slide in Barnes & Noble's opening presentation, and I can hand
20 you the slide, it might be easy for discussion purposes.

21 THE COURT: We are going to get the jury panel up
22 here. We are going to select the jury, and I am going to then
23 give them about ten minutes to go to the jury room to get
24 familiar with the jury room. Then we are going to bring them
25 back and hear opening statements. So during that ten minutes

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1 we can take any objections to your adversary's opening
2 statement in terms of a slide.

3 After the opening statements, we can then take up all
4 the other matters, and I am sorry that we can't reach our
5 friends from Amazon until then, but on the other hand, they
6 should be thrilled to witness the jury system in action.

7 We will give you folks a five-minute break now while
8 we bring up in the panel.

9 Everyone in the audience needs to move to the back row
10 because the jury panel is going to be in the front rows.

11 We will see you in five minutes.

12 (Recess)

13 (Prospective jury panel enters courtroom)

14 (Jury selection commences off the record)

15 (Continued on next page)

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(A jury of 9 selected and sworn)

(Jury not present)

THE COURT: First, I have decided not to play the patent video. I think this is a pretty straightforward case. I don't think there will be any difficulty with the jurors understanding what it's all about. I do want to perhaps tomorrow morning give them some preliminary instructions. Do I have proposed preliminary instructions from both sides?

MR. BAUER: Yes, your Honor.

MR. EDERER: Yes.

THE COURT: Very well. I will read them later today. Thank you so much.

There was an objection to one demonstrative in defense counsel's opening that someone wanted to raise.

MR. CABRAL: That is correct, your Honor. It is only with respect to the one of the slides in the opening demonstrative. The slide relates to licensing and investment efforts. The title of the slide is "ADREA Licensing and Investment Efforts." There are two columns. The first column is under a subheading "Possible Target." The second subheading is "Under License" with a question mark. The slide lists a series of companies under the heading "Potential Target," and the indication under the license category, there is an X.

Among the first two companies listed are Apple and Google. That is probably not a coincidence given that they are

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1 very well known. We are not aware of any direct evidence that
2 ADREA contacted Apple and Google for licensing discussions
3 relating to the patents at issue in this case.

4 THE COURT: All right. Let me hear from your
5 adversary.

6 MR. EDERER: Your Honor, the intention of the slide is
7 to indicate companies that were targeted by ADREA since its
8 formation for licensing or investment efforts. Apple and
9 Google appeared on that list from day one. The idea is we are
10 trying to get across to the jury that with respect to all the
11 companies that had been on the list since day one that had been
12 targeted by ADREA, these companies, none of them have actually
13 either vested or taken a license with ADREA. I don't think
14 there is anything misleading or unfair about it.

15 It is also not entirely clear from the documentation,
16 but there is indication on the target list that Apple and
17 Google were to be contacted. There was also an email which you
18 will hear about during the case where, after the Amazon
19 litigation was settled by ADREA, Barnes & Noble, Apple, and
20 Google were the obvious primary targets of the company.

21 And it is not just Apple and Google on that list, it
22 is seven or eight names. The point we are trying to make to
23 the jury is that despite all these companies you have heard of
24 having been targeted or considered as targets by ADREA, none of
25 them have taken a license or invested in the company. There is

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1 nothing misleading.

2 THE COURT: What is the relevance?

3 MR. EDERER: The relevance has to do with the issue of
4 damages, your Honor. It goes to the question of whether ADREA
5 was able to make any deals with any of these companies with
6 respect to licensing. The damages expert for ADREA relies very
7 heavily on the fact that this company had an opportunity to
8 sign up tremendous licensing deals along the way. I think it
9 goes directly to the issue of damages that none of these
10 licensing deals that they attempted to sign up were actually
11 consummated.

12 It also goes to the issue of secondary --

13 THE COURT: Your adversary is saying with respect to
14 Apple and Google they didn't even try. I don't see how it
15 shows what you are saying it shows.

16 MR. EDERER: By the way, there is also a very clearcut
17 email that says that Apple and Google were the subject of claim
18 charts, that the claim charts were developed with respect to
19 them. I think we should at least be given the opportunity
20 inquire as to what contacts were or were not made.

21 THE COURT: That may be. I have to rule on that now.
22 It is just a question of what is permissible in the opening
23 statement.

24 MR. EDERER: All the opening statement will say is
25 that these companies were targets, targets from day one, and no

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1 investments or licensing deals were made with any of them. It
2 is very straightforward and truthful and not misleading.

3 MR. CABRAL: To be clear, we have two objections. One
4 is under rule 403 for being confusing and misleading. That has
5 two parts to it. One is the Apple and Google piece of it. The
6 clear indication from the slide, and we have a copy for your
7 Honor if you would like to see it, is that Apple and Google
8 were contacted and there is no license.

9 If there is no direct contact between the companies,
10 the fact that those two companies don't have a license is a
11 pretty straightforward conclusion. But here it gives the
12 impression to the jurors that those two companies were
13 contacted and specifically chose not to take a license.

14 THE COURT: As I understand defense counsel, he is
15 going to clarify that. I take it you will say not all these
16 companies necessarily were contacted but they were all targets.

17 MR. EDERER: Right. The column that Mr. Cabral is
18 referring to is headed "Targeted Companies."

19 MR. CABRAL: The other column says "Licensed" question
20 mark. We don't have necessarily any issue with the remaining
21 companies on the list. But Apple and Google are two very, very
22 well-known companies. The implication that they considered a
23 license to the patents --

24 THE COURT: That is not the point he is making. I
25 have some question when this ultimately comes into evidence. I

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1 think there will be some interesting evidentiary questions as
2 to whether it comes in and in what form. Of course, opening
3 statements, am I am about to tell the jury, are not evidence.

4 Unless something is hugely inflammatory or something
5 like that, the fact that you hope to keep it out later doesn't
6 preclude it. With the wording that defense counsel has now
7 made clear that he is going to use, I don't think there is any
8 basis for me to preclude it from opening statements, so I will
9 allow it.

10 MR. CABRAL: There is only one other issue with
11 respect to 403. That is the last entry on the list, Amazon,
12 who is a licensee in this case. There is a window, which has
13 been since been modified somewhat by defense counsel, saying
14 through litigation, the clear implication being that Amazon
15 only took a license by virtue of the fact that it was sued.

16 In 2013 Amazon exercised an option to the portfolios
17 of Sony and Philips which contributed to ADREA, the plaintiff.
18 That license, that option license, was taken independently of
19 any litigation. Our second challenge under rule 403 would be
20 giving the jury the misleading impression that the complete
21 license taken by Amazon was taken only as a result of
22 litigation.

23 MR. EDERER: Your Honor, that license, that option was
24 part of a settlement agreement with Amazon. There was a
25 portion of the Amazon settlement agreement where Amazon took a

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1 license to the Discovery patents, including some of the
2 patents-in-suit here. Then there was a portion of the
3 litigation settlement agreement where Amazon was given the
4 option over a period of time to take additional licenses with
5 respect to patents owned by Sony and by Philips, including one
6 of the patents-in-suit here. All of this came straight out of
7 the litigation settlement agreement.

8 THE COURT: Again, I think there is a dispute here
9 that may have to be resolved by the Court when we get to the
10 actual evidence. But given the representation that was just
11 made, I don't think there is any reason to preclude the
12 reference in opening statement.

13 If it turns out that the representation is mistaken or
14 inadequate in some respect, the other party can ask for some
15 sort of appropriate instruction from the Court. You, of
16 course, are always free to comment on summation about a failure
17 or mistake that the other side made on opening statement. But
18 I think it doesn't go beyond the pale of what is permitted in
19 opening statements, so I will allow it.

20 Hearing all this, though, I remind counsel that they
21 each have a half hour for opening statements, not 31 minutes.
22 I will cut you off at 30 minutes.

23 We will take a five-minute break and bring the jury in
24 to hear opening statements, and then we will take up the matter
25 that Amazon is here on afterward.

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1 MR. BAUER: Your Honor, since I'm going first, do you
2 give five minutes notice or two minutes notice?

3 THE COURT: Sure, if you would like. What do you
4 want, five minutes' notice?

5 MR. BAUER: That would be great, your Honor.

6 THE COURT: Terrific.

7 (Recess)

8 (Continued on next page)

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Opening - Mr. Bauer

1 (Jury present)

2 THE COURT: Please be seated. Ladies and gentlemen,
3 we are about to hear opening statements of counsel. I want to
4 advise you at the outset that nothing that either counsel says
5 is evidence. The evidence will only come from one of three
6 places. There will be witnesses who testify, there will be
7 exhibits that are introduced in evidence, and every once in a
8 while the parties may enter into what is called a stipulation,
9 where they both agree on a given fact, and you can treat that
10 as evidence. Those are the only sources of evidence.

11 You may ask, why do we even have opening statements?
12 The answer is that the evidence will come in one little bit at
13 a time. It may be a while before you begin to get the full
14 picture. To help you in that regard, both sides are given the
15 opportunity to, in effect, give you a roadmap of what they
16 expect the evidence will show or fail to show, as the case may
17 be. This is their prediction. It is not evidence, but it
18 still will help, I think, frame the context for you to evaluate
19 the evidence as it comes in.

20 We will begin with plaintiff's counsel and then with
21 defendant's counsel. Each side is given 30 minutes.

22 Counsel.

23 MR. BAUER: Thank you, your Honor.

24 I'm Steve Bauer. Before I say anything else, I am
25 losing my voice. This is not what I normally sound like. The

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Opening - Mr. Bauer

1 microphone will help, but you all are close enough.

2 Before I get into the evidence, I do want to thank you
3 all. I know this is the last thing you hoped you would be
4 doing this week. We know it is a big imposition on you, on
5 your time, you would rather be doing other things. We really
6 do appreciate it.

7 We believe in the jury system. You being here is
8 going to be a big help for both of us. You are going to hear
9 that there is a battle between us and Barnes & Noble, and it is
10 going to take good people, honest people, fair people like you
11 to get to the right answer. We think it is us, but we do
12 appreciate you being here.

13 As the judge told you, by the end of the week, by the
14 end of the two weeks, we do hope you find this informative,
15 educational. We are going to try to make it interesting to you
16 all. It is technology, but, as the judge told you, the
17 technology is not going to be too deep down.

18 What we are accusing here is the Barnes & Noble Nook.
19 It's the Nook that we are charging. There's a half a dozen
20 different versions. They come in different sizes and shapes.
21 But what we will be talking about is the Nook and how it
22 operates.

23 I represent ADREA. There are three patents in this
24 case. At the beginning the judge told you there was one.
25 There is actually going to be three patents. There is a little

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Opening - Mr. Bauer

1 bit of tutorial in the beginning because you all haven't done a
2 patent case before. The patents have these long numbers. Both
3 sides will be referring to them by the last three numbers:
4 '501, '851, '703.

5 You will hear those numbers over and over. You don't
6 have to memorize the numbers. We also have a short form way to
7 describe them. The titles are much longer, but we refer to
8 them by these titles: Ebook lending, secure ebook
9 distribution, and device-specific content. Let me tell you
10 very briefly what those are. You will be hearing experts
11 testify. You will hear from the inventors on all of these
12 patents tell you what they thought they were doing.

13 Ebook lending, that's a patent. These are valuable
14 patents. They come from the 1990s, these patents, the ebook
15 lending patent 1994. What it is is when you own a Nook and you
16 buy a book and you want to loan it to a friend, the Nook lets
17 you loan to it a friend for two weeks. The friend who has the
18 book can get on it, push a button that says I want to borrow
19 it, and the book is downloaded onto the friend's Nook for two
20 weeks. That's ebook lending.

21 Back in the 1990s, think about it -- the Nook came out
22 in 2009. The Kindle, the leading ebook reader, came out in
23 2007. This was a 1994 invention, the idea of downloading a
24 book so that it disappears or becomes encrypted so that you
25 can't use it after two weeks.

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Opening - Mr. Bauer

1 The other patent, the '851, secure ebook distribution,
2 gets into copyright protection and encryption and how you
3 download these books from an online bookstore to get here in a
4 secure way. Back in the 1990s these were big issues. Today
5 you get your Nook, you download it in a second, you push a
6 button, the book's there.

7 Back in the '90s, when they first were introducing
8 these, book publishers were the big problem. Book publishers
9 saying, I don't want electronic books out there, because if you
10 download an electronic book to a computer and if it is not
11 encrypted and it is not secure, the person who gets that book
12 can then send it to their friends, and that single book that
13 you buy for \$9, hundreds of copies can get around.

14 So the publishers were the big hurdle. People were
15 trying to figure out how can we make them happy. One was was
16 this, the book disappears after two weeks if you loan it. The
17 other was how do you encrypt it and download it in a secure way
18 that protects the copyright.

19 The third patent, which we call device-specific
20 content, that patent is not about ebooks specifically. That
21 patent is about how do you get content for any device in an
22 easy way. That patent came out in the year 2000. One of the
23 things you can do with a Nook, you push a single button that
24 takes you to the Barnes & Noble bookstore, a single button
25 takes you right to the bookstore.

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Opening - Mr. Bauer

1 Put yourself back to when these inventions were made
2 back in 2000. I don't know how many of you guys are computer
3 geeks or whatever, but when you wanted to go on line back then,
4 you had to do a dial-up. You had to dial the telephone. You
5 had a modem. Sometimes you put the telephone into the modem.
6 But it went over the telephone lines.

7 Facebook was 2004. The iPhone was in 2007. Back in
8 the 1990s we are talking about Tickle Me Elmo. If you can put
9 yourselves back in time to when these inventors made these
10 ideas, they were novel, valuable at the time. We are going to
11 show you in this case that those inventions are now in the
12 Nook.

13 You are asking, who is ADREA, I have never heard of
14 these guys, and where do these patents come from? You were
15 asked if you had heard of Sony, Philips Discovery, and
16 Intertrust. ADREA is a company that was formed in 2010 by
17 these four companies. You know these companies, at least some
18 of them. They are leading innovators.

19 They are companies that spend a lot of money on
20 research and development, develop new technologies: Sony, the
21 Walkman, the Play Station; Philips largely invented the CDs and
22 DVD players and consumer appliances; discovery Communications,
23 you know their cable network, Discovery, the Learning Channel,
24 Animal Planet.

25 Two of these patents were invented by the founder of

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Opening - Mr. Bauer

1 Discovery Communications, Mr. Hendricks. You will see some
2 video from him when he talks about what he was thinking when he
3 got these patents back in the 1990s.

4 The fourth company up there, Intertrust, is not a
5 household name. You probably haven't heard of Intertrust.
6 Intertrust is a company that has dozens of engineers, hundreds
7 of patents. Any time you download a movie on the Internet from
8 Netflix or from iTunes, that's being downloaded in part using
9 Intertrust technology.

10 These are all leading, innovative companies, R&D
11 companies.

12 In 2010 they got together and said let's put together
13 a company called ADREA. ADREA stands for "advanced reading
14 algorithm." Reading. What they did is they, these companies,
15 put technology into ADREA. They said we are going to form a
16 company. Sony, Philips, and Discovery put technology in.

17 Intertrust is a licensing expert. They have these
18 patents. There are technologies out there. Their field is
19 communications over the Internet, things like movies and
20 whatever. These companies got together and they asked
21 Intertrust to take the lead in licensing this technology and
22 helping to promulgate the technology out there.

23 Our first witness is Talal Shamon. By the way, the
24 witnesses aren't in the room. The Court doesn't allow any
25 witnesses to come in to hear my opening. They don't get to

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Opening - Mr. Bauer

1 hear everybody else's testimony. It is a way that you can have
2 confidence that when they come in here, they are not being
3 influenced by what we say or by opposing counsel. That's why I
4 can't point to Mr. Shamon. He is sitting out in the lobby.
5 You will hear him this afternoon.

6 Mr. Shamon -- Ph.D from Cornell University, a
7 research engineer, CEO of Intertrust, that company I was just
8 telling you about with all the engineers and patents -- they
9 asked him to be the president of ADREA and take the lead in
10 getting this technology out there.

11 Let me give you a little bit of a time line to put
12 these in context as the evidence comes in. These patents we
13 are talking about, two of them came from Discovery: Ebook
14 lending, Mr. Hendricks 1994, the distribution 1999. This
15 device-specific content, which I said wasn't ebook specific but
16 was a device, applied consumer stuff, that came from Philips.
17 Philips wasn't specializing in ebooks. Philips was
18 specializing in getting things into the home. Those are the
19 three patents.

20 The Kindle doesn't come out until 2007. The Kindle is
21 the first commercially successful ebook reader. Then the
22 Barnes & Noble Nook two years after that.

23 I will tell you and Mr. Shamon will tell you that
24 Amazon has taken a license to these patents, paid a lot of
25 money for that license. He will tell you that after he took

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Opening - Mr. Bauer

1 the license, and this is one of the exhibits you will see, they
2 sat down with Barnes & Noble and said, listen, Amazon has taken
3 a license with us, gave them detailed analysis of why Barnes &
4 Noble should take a license to this technology as well, what we
5 call claims charts.

6 They went through the patent claim, compared it to the
7 Barnes & Noble technology, and basically said we are not hiding
8 anything, we want you to see what our technology is and why you
9 should take a license also. Essentially, Barnes & Noble said
10 sue us. That's what brings us here today. That's why we need
11 your help to get this resolved.

12 We're not in the business of suing people. But when
13 you want to license your technology, the leading company has
14 taken a license and the number two company, Barnes & Noble
15 says, I'm not going to pay you, it brings us to court. That's
16 what we are here for today.

17 There are three things to keep in mind as we go
18 through this case and as you sit here and listen to the
19 evidence, three points I want you to remember. First, these
20 patents, look at the dates on these things. When we talk about
21 patents, they are going to be saying they are obvious and
22 nothing valuable here.

23 You are going to be asked to put yourself back, and
24 our expert who talks about that will come in and tell you
25 you've got to put yourself back -- this is what the law

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Opening - Mr. Bauer

1 requires -- back in 1994, back in 1999, and know what the
2 engineers were dealing with back then.

3 Hindsight is such an easy thing. Any of you who own a
4 Nook or a Kindle or iPad or any of those things, it is so easy
5 to look at those things and say of course the book should
6 disappear after 14 days if you lend it, that's obvious. But
7 how it is done isn't obvious, and that's what these patents
8 describe. Put yourself back. That's one point.

9 The second is keep in mind where this technology came
10 from. This technology came from leading innovative companies,
11 companies that spend a lot of money on R&D. These aren't
12 people that are just tinkering around. These are companies
13 that develop, invest in R&D, get patents on that technology in
14 the regular course.

15 Why do they get patents on that technology? Because
16 the patent gives them the opportunity to recoup some of that
17 R&D cost from people further down. In technology you stand on
18 the shoulder of the giants before you. People don't start
19 their technology. When Nook sat down, Barnes & Noble sat down,
20 they didn't put people into a dark room by themselves and say
21 just imagine.

22 They knew what was out there at the time. They had
23 seen the Kindle. They had seen where technology was going.
24 They build upon what people had been doing before. The fact
25 that these products come out later, they are still building.

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Opening - Mr. Bauer

1 You are going to hear how they are using the technology that
2 Discovery and Philips invented.

3 The last point to keep in mind is what would a Kindle
4 be or what would a Nook be without the ability to use these
5 features. These things are much more than just a tablet with a
6 book on them. That's one thing. If you just had a book and
7 you downloaded a book and all you did was read it, that's one
8 thing. These are more than that. They let you loan the book.

9 What is the value of a feature that lets you buy a
10 book and loan it to your friends or family and be able to reuse
11 it? That's what makes these more like a real book. If you buy
12 a book from Barnes & Noble and you're done, you are able to
13 give it to a friend and say, hey, this is a great book, and you
14 don't have to pay for that. It wouldn't be right if you
15 downloaded a book and you paid for it and it was only for you,
16 you couldn't use it. They want these things to feel and act
17 like an electronic version of a book. That means being able to
18 loan it to somebody.

19 What if you couldn't get it push one button and go
20 right to the Barnes & Noble bookstore to buy it? What if you
21 had to go to the Internet, into a browser, and type in "Barnes
22 & Noble" every time and do a search or whatever? It's the
23 ability to go right to the bookstore. If you have an iPhone,
24 the app, like an iTunes app, if you push the button, it takes
25 you right to iTunes. That's what makes these things valuable,

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Opening - Mr. Bauer

1 what makes you want to own them, not if you have to sit there
2 and it looks like a computer every time you have to turn it on.

3 Let me tell you a little bit about these patents now,
4 because this is what the case is all about. Where does a
5 patent come from? What I have here is a blow-up. This is the
6 first page of a patent. These are the patents, what I'm
7 holding. They come back from the patent office. These are the
8 three patents in the case. I'll flip through it a little bit.

9 This is what happens with a patent. You go to the
10 patent office. You tell the patent office you think you have
11 an invention. That's all you say, I think I have one. You
12 write it up. You give a detailed technical description. You
13 tell them about everything. If you can see, you give them all
14 your engineering drawings that you can, in this case a lot of
15 drawings. You get pages and pages of technical description.
16 You tell the patent office what you think your invention is.

17 The examiner looks at it, does his own patent search,
18 goes to see if anybody did this before you, if you might be
19 wrong. After the investigation and the give-and-take with the
20 examiner, if the examiner, the patent office, thinks you're
21 entitled to a patent, this is what you get.

22 What does it tell you? The director of the patent
23 office has received an application for a patent, the titles are
24 enclosed, the requirements of law have been complied with, and
25 it has been determined that a patent on the invention shall be

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Opening - Mr. Bauer

1 granted.

2 What does that patent give you? Now I have a piece of
3 paper. That's nice. Next paragraph. It gives to the person
4 having title to this patent, the person who owns it -- so it
5 doesn't matter that now the patents are owned by ADREA; even
6 though they started at Discovery, they put them into this
7 company -- it gives to the person who owns this patent the
8 right to stop others from making, using, offering for sale, or
9 selling the invention in the United States. It gives us the
10 right to stop them.

11 That's not what we are here for. We are not asking
12 you to stop them. It is to stop them or pay us. We want this
13 technology out there. That's why ADREA was formed, as a
14 company that takes the patents from these different companies
15 and one-stop shopping for these licenses. A company that needs
16 the technology, rather than have to go to Discovery and go to
17 Sony and go to Philips separately, the patents for ebook
18 readers are in one place, one license, easy to deal with.
19 That's what the patent gives us, subject to the payment of
20 maintenance fees as provided by law.

21 So, this is the patent that we've got, or three of
22 these patents.

23 You are going to hear from two of our inventors on
24 these patents. First, John Hendricks. He is not able to be
25 here personally. He is the founder and CEO of Discovery

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Opening - Mr. Bauer

1 Communications. He did this technology in Discovery. You have
2 some of the logos. If you don't know Discovery but if you are
3 on cable, he founded Discovery Communications.

4 He was a prolific inventor and technology geek in the
5 1990s. You are going to hear from a video. We are going to
6 play a video. It will be all together. There is some stuff
7 that we want you to hear, some stuff that they want you to
8 hear. We put them together. It is about a one-hour long
9 video. You will hear from him telling you about his
10 background, what he thought the invention was, and how he came
11 up with the two patents that are his, the ebook lending and the
12 secure book distribution.

13 You are also going to hear live from Eugene Shteyn.
14 He was one of the inventors from Philips. He was the former
15 principal scientist there. He now teaches at Stanford
16 University. He is going to tell you about that technology and
17 what he was thinking and doing in terms of being able to get to
18 the Internet and get you directly to a website with a single
19 push essentially instead of having to search and find, and why
20 that was easy -- not easy -- preferable and something that he
21 thought would be easy for the world to use.

22 Now, what is patent? A patent, we call it
23 intellectual property. One way to think about it, it's
24 property. The typical analogy is to real property. A patent
25 is just like a deed to real property, with one small

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Opening - Mr. Bauer

1 difference. When you have a deed to real property, you
2 describe your property on that deed. You say I own a hundred
3 feet to the river, I own lot number 38. We know exactly what
4 your property is. It's easy. You record it at the recording
5 office and you know exactly what your piece of property is.

6 How do you do that with an idea? How do you describe
7 what your idea is?

8 I should say something about infringement. I'll show
9 you what we do. We have a claim, a word claim. In words we
10 describe the invention. Infringement is when they fall within
11 that scope. That word description is essentially the fence
12 around our property. Infringement is when they are inside that
13 fence or fall within that word description.

14 This is a simple example of a claim, one that helps
15 you understand. What is a claim? Let's say you invented the
16 soccer ball. How do you describe what your invention is? I've
17 got to describe my invention. The invention is a ball you can
18 kick, made of leather stitched together, filled with compressed
19 air. You have used those words. You say my invention is these
20 four things. That becomes your fence.

21 Notice it doesn't say anything about being a soccer
22 ball or the color of the ball or the size of the ball. None of
23 that is part of the invention. The invocation here is a ball
24 you can kick made out of leather. That claim would cover a
25 football. It is still a ball you can kick made of leather. It

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Opening - Mr. Bauer

1 does not matter if they are small changes. If your invention
2 is a ball, you get to patent the ball, if that is your
3 invention.

4 So, small improvements, small changes, or in the case
5 of the Nook changes that took place over the last ten years,
6 from our inventions back in the 1990s to today. It doesn't
7 matter that it looks a little different. Back in the 1990s you
8 had keypads, you had to push a button.

9 If you think about the old BlackBerry, you have to
10 push keys. Now they call them keypads, but there is no
11 physical key. It still looks like a keypad, it acts like a
12 keypad, but it looks a little different. The claim covers
13 those things because the invention isn't the specific thing you
14 made. It's the concept, the idea. That's what you patented.

15 Let's look a little bit at the actual patent that we
16 are talking about just so you can get a sense. The first
17 patent that I want to talk about, this is the '501 patent, the
18 first page of the patent. A lot of information on here. Some
19 of the things you see when you look at the patent, you see the
20 inventor's name, who owned it, who he worked for, in this case
21 Discovery. There's a bunch of dates and numbers that the
22 patent office uses.

23 The filing date, and everybody will agree, the patent
24 office, the way it works, the date that is important is this
25 case was filed on November 1994. That's the invention date.

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Opening - Mr. Bauer

1 Nobody is going to take any issue with that.

2 Then it talks about who the examiner was, the patent
3 examiner. This is the date the patent was issued, 2007. That
4 is not important today except for you to see how long it takes
5 to get a patent sometimes. This case was filed in 1994, issued
6 in 2007. The patent office is not fast.

7 Then you give an abstract. You talk about what you
8 think the invention is, in this case an electronic book
9 selection delivery system, a new way to distribute books, and
10 other textual information. The title is "Electronic Book
11 Selection and Delivery System Having Encryption." This is the
12 first page of the patent.

13 There are references cited. This tells us what the
14 examiner looked at. In this case on the first page there is
15 just one thing. That is because, if you can see, these pages,
16 all these numbers, every one of these is a patent, somebody
17 else's patent. The examiner, when he does his search and finds
18 things --

19 You also have to tell the patent examiner what you
20 think is relevant. You don't just say, I have an invention.
21 You have to say, I think other people did things close.
22 Remember, all invention is building on something, all
23 invention. Nobody ever invented anything from scratch. The
24 lightbulb wasn't invented from scratch; it was the best
25 lightbulb.

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Opening - Mr. Bauer

1 This is all the stuff the patent examiner looked at in
2 coming up with this.

3 This is just a graphic for now, but this is all
4 exhibits. This is the patent file. This is what comes back
5 from the patent office. Everything that goes on in the patent
6 office is public record. What the examiner thinks, he writes
7 to you. What you think, you tell him. You each explain what
8 you think the invention is. You tell him what the property is.

9 When he is done with all that and he gives you the
10 patent, this is the claim. This is going to be the focus of
11 the case. There are a couple from each patent. I was telling
12 you that there are these word claims that you describe your
13 invention. There are a lot of claims in these patents. You
14 describe them with different words because you are trying to
15 describe your invention with words.

16 You will see there is a claim 96 from one of the
17 patents. We are only talking about one or two claims from
18 every patent. You don't have to go through them all. We have
19 picked one or two that we think are representative. In this
20 case claim 7 is the one that we are talking about.

21 You can see what he claimed as his invention: A
22 method for restricting access to books, storing a book on a
23 viewer, associating a time after the book is stored, allowing
24 access to the book for that predetermined amount of time, and
25 then restricting access to the book once the determined time

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Opening - Mr. Bauer

1 has passed. You can see that 14-day loaning period.

2 We are going to have our expert get up here and go
3 through every element here element by element. Our expert is
4 Brian Berg. He started his career at NASA working on software
5 for rockets. He now has a software design business. He is an
6 expert in consumer electronics and how they work. He did a
7 forensic study. He is our expert. He had to prove
8 infringement.

9 As you can imagine, what goes on in the Nook isn't
10 always public. But in this case, the way the system works,
11 they had to turn over their computer code, their engineering
12 diagrams, part of the legal system. He had access to that. He
13 took products apart, he did testing. He is going to go through
14 the detail and explain how he went through it and take each one
15 of these things step by step, go through it and show you that
16 this is exactly what the Nook does.

17 Remember when I said the technology is not so tough?
18 What goes on inside the Nook is in detail, and he is going to
19 tell you what he saw. But at the end of the day you will see
20 that what the Nook does is you store the book on a viewer and
21 14 days later it turns off.

22 I have an asterisk here. There are some terms in
23 these claims that the parties dispute, find ambiguous, because
24 this was written a long time ago. When we have a disagreement
25 about what the terms mean, we came to court. There is a

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Opening - Mr. Bauer

1 process in the system.

2 We asked the judge to interpret that. There are a
3 couple of terms, "electronic books" and this term "associated,"
4 where we asked the judge to interpret and help us along. He
5 does that. As we go through this case, when you have these
6 claims, those terms that are asterisked, the judge will tell
7 you you need to use his definition.

8 What is sort of interesting is there are some words
9 that are ordinary words to you or me that you or I would always
10 think, I know what this is. But because they were described
11 one way in the patent by the inventor, they may have a
12 different meaning. We will ask you to step aside. The judge
13 is going to tell you these are the right definitions. This
14 isn't me playing games.

15 For example, "title," we all know what a title is of a
16 book, right? It's the name of a book. But in the context of
17 this technology, "title" has a different word. You are going
18 to hear them talk about titles. You have to always stop and
19 say, are they using the ordinary word that you or I would use
20 or are they using the judge's word?

21 They are supposed to be, when talking about the
22 patent, using the judge's word. It may be get confusing. They
23 will say the title of this book is X, and that's right. But
24 when we talk about the ebook, a title is not just a title, it
25 is any other designation including a graphical symbol. That is

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Opening - Mr. Bauer

1 going to be important because the computer, the ebook, the
2 processor, it doesn't read English titles. It's reading
3 computer code and special numbers.

4 THE COURT: Counsel, forgive me for interrupting you.
5 You asked me to tell you when you have about five minutes.

6 MR. BAUER: Thank you, your Honor.

7 Let me move along quickly. That is one patent. Let
8 me skip and give you a hint as to what the other two patents
9 are going to be about.

10 This is the second patent, the secure ebook
11 distribution. I don't need to go through it in a lot of
12 detail. This is the one claim we are going to be talking about
13 here. It is with respect to this that you are going to hear
14 "title" because this is talking about transmitting a book
15 electronically with encryption.

16 You will see it talks about the receiver selecting a
17 title from a list of books. They are going to tell you they
18 don't infringe, because the receiver doesn't pick the title.
19 They are going to say you choose the title, the user chooses
20 the title. Of course an ebook reader doesn't pick the title;
21 you tell them what you want.

22 That's why we need that special definition. When they
23 say you are picking the title, you are saying I want this book,
24 yes, you are picking that. But the computer doesn't know that.
25 What we are going to show you and Mr. Berg is going to show you

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Opening - Mr. Bauer

1 is when it talks about selecting a title here, it is that
2 special definition. It is not picking the title of the book
3 itself. What it's doing is it's picking that bar code, that
4 special number. So, when you say, I want The Da Vinci Code, it
5 is going to give you that special number. That is the title.
6 That is the definition.

7 I want to touch base on this one. This is talking
8 about downloading the book that we are talking about. The
9 definition for that begins when the book is stored. The 14
10 days begins when the book is stored. They are going to tell
11 you because of security, they are going to tell you that when
12 is essentially simultaneous.

13 There is a one-second gap because of the way computers
14 work. You are going to say, I want that book. You push a
15 button. It processes it. That's a second or two. Then the
16 book is downloaded. They are going to say it's not starting
17 when the book is downloaded because of the one second. But
18 computers do things sequentially. There is nothing exactly
19 simultaneous. It is not when. You get that book for 14 days,
20 to midnight 14 days later. When you say, I want it, they are
21 going to say, well, but it's not when it is downloaded, the
22 clock started a second or two seconds before.

23 This is the kind of defense they are going to be
24 raising and putting in front of you when they say, we are not
25 using your technology, we don't owe you any money. Because of

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Opening - Mr. Bauer

1 one second out of 14 days, they say they don't owe us, and
2 things like that.

3 The last patent that we will talk about is the
4 consumer appliance. This is the idea that you can go -- well,
5 we are not going to go into this. I'm out of time. Basically,
6 here is what the idea is. It is the shop application. You
7 push a button and up comes the Barnes & Noble bookstore.
8 That's all you do, push the shop button, and up it comes.
9 That's what this invention is about.

10 They are going to try to misdirect you. They are
11 going to say the patent talks about not using a web browser.
12 They are going to say the bookstore is a web browser. You know
13 what a web browser is. It's Internet Explorer, it's Safari, it
14 is how you search the whole Internet.

15 If I told you that in the jury room you had a computer
16 with access to a web browser and you went back there and the
17 only thing it gave you was a Barnes & Noble bookstore, you
18 would be pretty angry. That's not a web browser. A web
19 browser lets you do the whole Internet. In fact, they have a
20 web browser. There is something called a web button right next
21 to it that takes you to Google Chrome.

22 This is the type of infringement defenses they are
23 going to be telling you about as we get here.

24 Very briefly, we are going to have our damages expert
25 after we tell you about infringement. He is going to tell you

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Opening - Mr. Bauer

1 how he calculated the royalties in this case. He is going to
2 tell you that the royalty is about 50 cents per unit, there are
3 about 12 million units of sales. He is going to tell you how
4 to get to the lump sum final number based on present value when
5 the negotiation had taken place.

6 We have to go back to 2009 to figure out what it was
7 worth in 2009. Don't let them tell you the Barnes & Noble
8 product is failing today, it is not doing well today. It
9 doesn't matter. The question is what would they have agreed,
10 this is the law, what would they have agreed in 2009 when they
11 introduced their product and thought it was going to be as
12 successful as the Kindle.

13 Then, we sit down and they get to come in after I'm
14 done. They are going to come and tell you that, hey, we are
15 not using any of this technology.

16 THE COURT: Counsel, I'm sorry. When you said you are
17 going to sit down, you were right.

18 MR. BAUER: All right. Thank you, your Honor.

19 Ladies and gentlemen, the judge has a very strict 30
20 minutes. I apologize I can't finish everything today. But I
21 will get to it. We will be here and you will see our case and
22 our evidence, and we look forward to convincing you. Thank
23 you.

24 THE COURT: Thank you very much.

25 (Continued on next page)

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Opening - Mr. Ederer

1 THE COURT: All right. We will now hear from defense
2 counsel.

3 MR. EDERER: One moment, your Honor.

4 THE COURT: Yes.

5 MR. EDERER: I was going to say good morning, ladies
6 and gentlemen, but I guess it's good afternoon at this point.

7 My name is Louis Ederer, and I am the lead trial
8 counsel for Barnes & Noble in this case.

9 Joining me at counsel table are several of my
10 colleagues, and you will be hearing from them. They will be
11 participating in this case as well. Also at counsel table is
12 Elizabeth Brannen. She is a member of the Barnes & Noble's
13 legal department, and Liz will be with us, hopefully, for the
14 duration of the trial as well.

15 Now, as you have already heard, our clients in this
16 case are three affiliated companies that make up Barnes &
17 Noble. And many of you know and are familiar with Barnes &
18 Noble. It's a well-respected, well-known retail bookstore
19 chain with roots right here in New York. In fact, Barnes &
20 Noble started right here in New York City and has been part of
21 the New York community for 50 years. The flagship store has
22 been on Fifth Avenue in Manhattan for many years. And the
23 company's original owner started his book-selling career when
24 he was a student at NYU in the 1960s. And over the past 50
25 years Barnes & Noble has opened bookstores all over the country

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Opening - Mr. Ederer

1 and has become part of the fabric of not only our New York
2 community, but the nation's communities. And I imagine some of
3 you have spent some time in Barnes & Noble bookstores over the
4 years.

5 But the part of Barnes & Noble's business that is
6 involved in this case, as you have heard, is the Nook. Some of
7 you may be familiar with the Nook. Some of you jury members
8 had said you may own a Nook or your wife uses it. It's a
9 device that Barnes & Noble came out with back in late 2009 that
10 lets you read electronic books. And at the time the Nook was
11 introduced, the Amazon Kindle and other similar devices were
12 already out in the market.

13 This case is about whether three things that the Nook
14 does infringed three patents owned by the plaintiff ADREA. Of
15 course, ADREA says, yes, they do infringe, and we say, no, they
16 don't infringe. And I am a little biased, but I think that
17 after you hear all the evidence in this case, you will get it,
18 you will apply your common sense and you will say no as well,
19 for a whole variety of reasons which we will explain to you as
20 clearly and as directly as we can to you.

21 So let me tell you a little bit about the evidence
22 that Barnes & Noble intends to present to you in this case.

23 First, where does ADREA come from? You heard a lot
24 about how ADREA is a joint venture of some companies you
25 know -- Sony, Discovery and Philips -- and that's true. And of

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1 course it all sounds very impressive. But ADREA is a company
2 you have never heard, and there is a reason for that. ADREA
3 doesn't make anything. It makes no products. In fact, as the
4 evidence will show, it exists for only one reason: To try to
5 monetize patents by trying to get companies to take licenses.

6 So it's important to remember who ADREA is. They are
7 what is called in the patent field a nonpracticing entity.
8 They don't compete in the electronic reader industry. Instead,
9 their purpose is to try to make money off of patents which they
10 had nothing to do with inventing, much less using themselves.

11 Now, how did ADREA even come to own these patents?
12 For years, Discovery Communications had a bunch of patents that
13 related to electronic reader devices. But don't misunderstand,
14 Discovery didn't invent eReaders only. As the evidence in this
15 case will show, the concept of electronic readers and
16 electronic books existed long before Discovery started applying
17 for patents. What Discovery and Sony and Philips owned were
18 some patents that related to some very specific functions of
19 electronic readers, not the whole concept of electronic books
20 or using devices to access, download, or share those books.

21 By the way, you will not hear any evidence that Barnes
22 & Noble knew anything about these patents when it was
23 developing the Nook back in 2009, because it didn't.

24 Here is another important piece of evidence that you
25 will hear. For many years, try as it might, Discovery, which

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1 also had never made an e-reader device, couldn't get a single
2 company in the e-reader business to pay for a license for these
3 patents; not Amazon, not anyone. The fact is you will hear
4 Discovery tried to get Sony to take a license for some of these
5 patents back in 2008 and 2009 when Sony had an e-reader device
6 out in the market, but Sony wasn't having any of it.

7 Now, you heard Mr. Bauer refer to Amazon having taken
8 a license. In 2009, Discovery decided to sue Amazon -- that's
9 the part he didn't tell you about -- for patent infringement on
10 the Kindle. But after a couple of years, Discovery decided it
11 didn't want to spend any more money fighting with Amazon. So
12 while that lawsuit was going on back in 2010, Discovery, Sony
13 and Philips all decided to throw in their e-reader patents with
14 this company called Intertrust, and they formed a new company,
15 ADREA.

16 They create this holding company to try to license a
17 bunch of patents, more than 300 patents, that no one had ever
18 been interested in licensing. The first thing ADREA does is it
19 goes out and settles the Amazon case. And then it tries to get
20 other companies in the e-reader industry to take licenses for
21 this whole portfolio of patents, the same patents Discovery
22 could never license for years and years.

23 As the evidence will show, now, after four years of
24 trying, ADREA has been completely unsuccessful, outside of
25 litigation, in getting anyone to take a license for these

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1 patents. As you will hear, they targeted Samsung, HTC, Intel,
2 Apple and Google and many others. Now, not all these companies
3 were contacted, but several of them were. Not one of them
4 signed up for a single license. And so the only way ADREA has
5 ever made any money off of these patents was to settle the
6 Amazon case. And that case ended up settling for a lot less
7 money than ADREA had been asking for.

8 So who was next for ADREA? As you will hear, they
9 told Barnes & Noble they were thinking about suing Apple and
10 Google, but I guess they had second thoughts about that. So
11 instead they sued Barnes & Noble. Maybe they thought we would
12 be an easier mark. And that's how we got here today. But as
13 you will see and hear, the difference between Barnes & Noble
14 and Amazon is we didn't do what Amazon did, what ADREA was
15 hoping we would do, just write them a check after they sued us.
16 We are taking this case to you, the jury --

17 THE COURT: Counsel, the purpose of an opening
18 statement is to describe what you believe the evidence will
19 show or not show, not to make arguments, and I think you're
20 getting a little too carried away.

21 MR. EDERER: Thank you.

22 Now, as Mr. Bauer told you, in this country you have a
23 patent system that exists to protect truly new inventions, and
24 patent rights are to be respected, and as you will hear, Barnes
25 & Noble doesn't take them lightly. In fact, Barnes & Noble is

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1 an innovator itself. Many of its Nook devices were the first
2 of their kind in the e-reader industry.

3 At the end of the case, the Court will instruct you on
4 how to decide these claims of patent infringement. But for now
5 it's important for you to remember that the words of the last
6 part of the patent, what we call the claims, are extremely
7 important. Patent owners only own what the words of the claim
8 say they own, not the general concept of the invention, any
9 which way it can be accomplished. So as you hear the evidence,
10 think about whether the Nook function that ADREA is complaining
11 about falls directly within those words or accomplishes the
12 function in a different way.

13 It's also important to remember that just because a
14 patent has issued out of the patent office, it's not
15 automatically valid. The patent office may not have had all
16 the information it needed to determine whether the patent
17 should have been issued. And we have the right to demonstrate
18 to you that the patent was invalid, in other words, that it
19 never should have issued in the first place.

20 So we intend to show you that we win this case two
21 ways.

22 First, we don't infringe. Our products don't do what
23 the patent claim said. We don't do what they actually have the
24 patent for here. Mr. Bauer talked to you about the soccer ball
25 example and he said, well, you can also say that you invented a

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1 football if you invented a soccer ball. Well, that's what they
2 are trying to do here. The claims in this case are very
3 specific and very limited, and we don't fall within them.

4 Second, we have the right to show you that these
5 patents are invalid, and we are going to do that two ways:
6 One, we can show you that the invention already existed at the
7 time that the patent was applied for. That's called
8 anticipation. Second, we can show you that the invention was
9 obvious from the technology that already existed. And what
10 that means is that someone familiar with the technology could
11 have figured it out for themselves.

12 We will show you that on one of those two bases -- the
13 anticipation basis or the obviousness basis -- that all three
14 of these patents are invalid. So they weren't infringed and
15 are all three invalid.

16 Now, I would like to introduce you to some of the
17 witnesses who will be testifying on behalf of Barnes & Noble.
18 This is your introduction to the evidence too because these
19 witnesses will explain to you what the Nook devices are, how
20 they work, why you should find that they don't infringe ADREA's
21 patents, and why you should find ADREA's patents to be invalid.
22 So who will you be hearing from?

23 First, you're going to hear from Jim Hilt. Mr. Hilt
24 was a senior marketing executive involved with Barnes & Noble's
25 Nook business for many years. He is going to explain to you

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1 how Barnes & Noble got into the Nook business, how it decided
2 to market the Nook and to whom. And he will discuss some of
3 the business challenges that Barnes & Noble faced, including
4 strong competition from Amazon, whose Kindle was the dominant
5 product in the market then and now.

6 He will also tell you about the company's marketing
7 strategy and the extent to which the Nook features that are
8 involved in this case were emphasized as part of that strategy.
9 I think you will find Mr. Hilt's testimony to be very helpful,
10 because unlike the ADREA witnesses you will be hearing from, he
11 actually knows something about the electronic book industry; he
12 has lived it for many years.

13 Second, you will be hearing from Deepak Mulchandani,
14 who was a senior technical person at Barnes & Noble. Mr.
15 Mulchandani was very involved in developing the various
16 versions of the Nook products that are accused in this case.
17 He knows intimately how they work. He will provide testimony
18 that will help you understand why the accused functions of the
19 Nook devices do not infringe the ADREA patents.

20 Now, you will also hear from Barnes & Noble's expert
21 witness, Dr. Clifford Neuman, who will testify on some of the
22 technical issues in this case. Dr. Neuman is a professor at
23 the University of Southern California. He has got a Ph.D in
24 computer science and over 25 years of professional, academic
25 and research experience in the field of computer networking and

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1 the Internet. He will explain to you how the Nooks work and
2 what technology was already in existence before Discovery and
3 Philips applied for the patents that are involved in this case.

4 Finally, you will hear from Ned Barnes. And his last
5 name is pure coincidence by the way. Mr. Barnes is Barnes &
6 Noble's expert witness on damages. He will explain why the
7 damages amounts that are proposed to you by ADREA's damages
8 expert, Stephen Magee, are unreliable, based on speculation,
9 and make no economic sense. And I will talk a little bit more
10 about the issue of damages later on in my opening.

11 I ask you to listen carefully to all of these
12 witnesses on direct and cross-examination. Their credibility
13 is important, and we think if you do that, you will find the
14 testimony of the Barnes & Noble witnesses to be very credible.

15 Now, let's take a look at the three patents involved
16 in this case and talk a little bit about the evidence that you
17 will hear, that we think will show you, if you apply your
18 common sense, that Barnes & Noble hasn't infringed them, and
19 also that they are invalid; they never should have issued out
20 of the patent office in the first place.

21 I am not going to highlight every issue for you, but I
22 want to alert you to one common theme. These patents, if they
23 cover anything, they cover old technology, and the new
24 technology has passed them by. As you will hear, these patents
25 are all directed to technology contained in physical devices.

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1 The Nook works differently. The Nook uses server- and
2 cloud-based processes, and these processes are simply not
3 covered by these much older patents.

4 Let's talk first about the '703 patent. As you will
5 hear, this patent covers consumer appliances, like blenders and
6 garbage cans, where you can press a button on the appliance and
7 it takes you to a dedicated Web site on the Internet. And when
8 you get there, you can see information about the appliance. If
9 it's a blender, it takes you to a site where you get a list of
10 smoothie recipes. If it's a garbage can, you get a list of
11 collection dates for your neighborhood. And claim 1 of this
12 patent requires that you do all of this without ever accessing
13 a Web browser.

14 Now, ADREA says that this patent is being infringed by
15 the Nook shop feature. But as you will hear from the Barnes &
16 Noble witnesses, the shop feature allows you to shop for books
17 to download to your Nook. When you activate the shop
18 application, it takes you to a Barnes & Noble bookstore on the
19 Internet, and then you can browse the bookstore and buy books.
20 So the shop application is just a convenient way to get to a
21 Barnes & Noble bookstore without having to type www.bn.com into
22 your browser.

23 After you hear how shop works, you will see for
24 yourself that the shop application is completely different from
25 the requirement of their patent that the user not access a Web

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1 browser, because the shop application is itself a dedicated Web
2 browser that is set up to take you to a location on the
3 Internet so that then you can do your browsing. And that's
4 simply not what the patent covers.

5 Now, with regard to the issue of the '703 patent's
6 validity, even if ADREA is right that their patent somehow
7 covers pushing a button on an e-reader to take you to a
8 location on the Internet where you can purchase books and other
9 content, that invention already existed when the '703 patent
10 was applied for. And what this means is that the claim that
11 ADREA is asserting against Barnes & Noble is invalid.

12 For example, you will hear about a patent issued to a
13 guy named Munyan. The Munyan patent discloses exactly what is
14 covered by the '703 patent, and it was filed long before the
15 '703 patent. Munyan shows a handheld electronic book reader,
16 that when the user selects a bookstore icon, it connects to a
17 server, identifies itself to the server, and retrieves
18 information, such as lists of libraries and other services, and
19 it does all of this without accessing the Web browser. If that
20 sounds to you like what they say the '703 patent covers, you're
21 right. So after you hear the evidence about the Munyan patent,
22 it will be clear to you that the invention covered in the '703
23 patent is not new.

24 Now, let's talk about the '501 patent. On the '501
25 patent, ADREA accuses the Nook's book lending feature of

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1 infringement. This feature, which Barnes & Noble calls "Lend
2 Me," allows one Barnes & Noble account holder to loan an
3 electronic book to another Barnes & Noble account holder for 14
4 days. And it's important to note that this feature only works
5 on an account-holder-to-account-holder basis. Anyone can
6 create a Barnes & Noble account with an e-mail and a password
7 and access that account from a variety of computing devices,
8 not just the Nook. So what this means is you can offer to loan
9 a book to another Barnes & Noble account holder, regardless of
10 whether they own a Nook device, or they just have a Nook app on
11 their iPad, or even if they just have an online Barnes & Noble
12 account on their personal computer. It's not something that
13 works on a device-to-device basis only.

14 This is important to understanding why Barnes &
15 Noble's Nook does not infringe the '501 patent. As you will
16 hear, the way the lending period works on the Nook, the 14-day
17 period begins to run when the server processes the acceptance
18 of the loan by the person you're offering it to. The loan is
19 accepted through the cloud, through Barnes & Noble's system of
20 servers, and the cloud is what tracks the lending period. And
21 that's the key here because the patented lending feature works
22 differently.

23 As you will hear, the '501 patent requires the lending
24 period to begin when the electronic book is stored on the
25 device, but the Lend Me feature is different. Barnes & Noble

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1 starts counting its lending period from the time the server
2 processes the acceptance of the loan by the person who is
3 borrowing the book. Two completely different approaches to
4 lending electronic books. Cloud based versus device based.
5 New technology versus old technology. So if you apply your
6 common sense, we think you will get this.

7 Let's think of an analogous example. It's like
8 borrowing a physical book from a library. Let's say there are
9 two libraries in town that allow you to reserve books online
10 before you come to pick them up. One library gives you 14 days
11 from the time you reserve the book online. The other library
12 gives you 14 days from the time you come in and pick it up. So
13 the loan period could be nearly the same. Let's say you
14 reserved the book online on your Smartphone while you were
15 walking to the library and you were a block away. But we are
16 still talking about two completely different concepts here, and
17 it's the same thing in this case.

18 This patent also has an invalidity problem. It was
19 completely anticipated by what is called the prior art, the
20 technology that was already in existence.

21 Now, here is what we call the Saigh reference. Once
22 you see the evidence, you will see for yourself that the Saigh
23 reference works exactly the same way as the claims of the '501
24 patent, and therefore these claims should never have been
25 allowed by the patent office.

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1 Let me just give you a quick preview. The Saigh
2 reference is directed to an electronic book reader, and it
3 explicitly discloses an electronic personal library device that
4 can be used to read books. And it also discloses, when the
5 books are downloaded to the device, there can be a set time
6 period after which the book that's stored in the memory module
7 will be automatically erased. If that sounds like the '501
8 patent, it's because it is. And we will show you and explain
9 it works exactly the same way and it predates the '501 patent
10 by five years.

11 Finally, there is the '851 patent. This patent covers
12 a certain way that an electronic reader encrypts and obtains
13 books. As Mr. Bauer mentioned, in order for an electronic book
14 to be available only to the people who select the book and pay
15 for it, the book has to be protected somehow. Otherwise it
16 could be copied by anyone who wants to read it. To prevent
17 this from happening, you use what is called encryption and
18 decryption. Once again, the evidence will show you that the
19 Nook devices work differently.

20 Now, you will hear that the claim at issue in the '851
21 patent is what is called claim 96. So claim 96 is supposed to
22 cover a device that selects the books to be downloaded from a
23 list. It's the device that selects the book, not the user.
24 The problem for ADREA, as you will hear from the Barnes & Noble
25 witnesses, is that the Nook device itself makes no selection.

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1 In the case of the Nook, it's the user who makes the selection
2 of the book. That's not what the patent says. The patent says
3 it's the device that makes the selection. And ADREA can argue
4 this point all it wants, but that's the fact. So if you decide
5 that the user selects what books to buy, then we don't infringe
6 claim 96 of the '851 patent.

7 As you will also hear, claim 96 of the '851 patent
8 requires that the device send and receive encryption keys for
9 encrypting a book.

10 Well, it turns out Barnes & Noble doesn't do that
11 either. Barnes & Noble pre-encrypts all of its books on its
12 own servers as soon as it gets them from the publisher, whether
13 the books are ever sent to the device or not. The encryption
14 doesn't come from the device; it's on the server. Once again,
15 it's not what we do and it's not covered by the patent.

16 We also believe you will understand after you hear the
17 evidence that this '851 patent is also invalid because it
18 covers an encryption process that was not new at the time that
19 the patent was filed.

20 You are going to here a story about how this patent
21 was put together. Mr. Hendricks and his coinventors took the
22 idea for an electronic book, an idea which was around for a
23 long time before that, and then they read some books on
24 encryption and copied them into the patent application. That's
25 not an invention. Because the idea of encrypted e-books was

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1 already around, copying someone else's encryption textbooks to
2 get a patent doesn't work.

3 Now, here is the Sachs patent. Just one of many
4 examples of the preexisting idea of sending around electronic
5 books with encryption that was generated by the device itself;
6 not the server, the device. We don't do that. But the Sachs
7 patent from 1998 did do that. And as the evidence will show,
8 the '851 encryption scheme was far from new and the inventors
9 didn't invent anything. So we say this patent is also invalid.

10 Now, let's talk briefly about the topic of damages,
11 and I want to preface my remarks by saying I don't want you to
12 misunderstand Barnes & Noble's position here. We don't think
13 there is any infringement in this case. In any case, we think
14 the patents are invalid, so we don't think you will have to get
15 to the point where you will even have to consider whether to
16 award ADREA any damages. So we are only talking about damages
17 here because we have to, since in cases like this you, the
18 jury, will be hearing all the evidence at one time. There is
19 no separate trial for liability and then damages. But just
20 because we are talking about damages doesn't mean that we think
21 you will ever get to the point of awarding any damages against
22 Barnes & Noble. We don't think you will.

23 Now, in calculating damages in a patent case, Mr.
24 Bauer briefly alluded to this, you're supposed to try to figure
25 out what was the amount Barnes & Noble would have agreed to pay

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1 to get a license for these patents before it started to make
2 the products. That's called a hypothetical negotiation to
3 determine a reasonable royalty.

4 Now let's talk about what their expert Magee's
5 calculation does and all the things you will hear about it that
6 are wrong. Mr. Bauer mentioned something about 50 cents per
7 device being the royalty amount that Mr. Magee is going to put
8 in front of you.

9 I will only touch on a few things about Magee because
10 there are so many things wrong with what Magee did and our
11 damages expert will tell you about them. I can't get to them
12 all now, but you will hear about them as we go through the
13 case.

14 Now, Mr. Magee is going to put some big numbers in
15 front of you, 50 cents times 12 million or whatever Mr. Bauer
16 said. And he is going to hope that some of those numbers stick
17 with you. Here is what the evidence will show.

18 First, Magee says Barnes & Noble would have agreed to
19 pay the same royalty rate of 50 cents per Nook device no matter
20 how many patents were infringed. It's 50 cents no matter what.
21 So ADREA is saying, even if you only find one of these three
22 patents to be infringed, it doesn't matter, it's still 50 cents
23 per device. Does this make any sense to you? How would you
24 react if you were at the corner deli and you wanted to buy a
25 bag of chips, a soda and some gum and the cashier tells you

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1 it's five bucks? Then you say no, I will just take the gum and
2 the soda, and cashier says, OK, five bucks. Then you say,
3 forget it, I will just take the gum. And the cashier says, OK,
4 five bucks. Does that make any sense? Well, that's what
5 Professor Magee is going to be putting in front of you. That's
6 exactly how he comes up with his 50 cents number.

7 By the way, all three of these patents involve
8 different functions -- encryption, lending, shopping, and they
9 all have different expiration dates. What does that mean?

10 The judge mentioned earlier that patents are only for
11 a limited period and then it expires. Well, one of these
12 patents has already expired. The '851 patent, the encryption
13 patent, expired in 2012. The lending period patent expires
14 next year in 2015. And the consumer appliance patent, the one
15 that refers to blenders and garbage cans, that one expires in
16 2026.

17 What they want you to do is award damages all the way
18 through to 2026, no matter what. And it's 50 cents no matter
19 what, no matter how many patents you find to be infringed.

20 Second, where does Magee get this 50 cent number?
21 Well, as you will hear, he uses data that has no relation to
22 what this hypothetical negotiation would have looked like.
23 Instead, he uses ADREA's opening licensing offer to Barnes &
24 Noble in 2012 which was not coincidentally, guess what, 50
25 cents per device, and Barnes & Noble rejected that offer.

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1 Think about it. When you want to come to a negotiated number,
2 you start out with a much higher number, right, and then after
3 you negotiate for a while, the number comes down. But here the
4 royalty number that ADREA's expert is going to be putting in
5 front of you is the same as their opening offer to Barnes &
6 Noble. By the way, that 50 cents offer was for a lot more than
7 just the three patents involved in this case. It involved,
8 according to ADREA, 300 patents all together. Yet somehow that
9 same 50 cents should now apply to three, two or one patents, if
10 you even find any of them to be infringed or invalid.

11 As I said, those are just a few of the things that
12 Magee did that we think are wrong in this case in coming up
13 with this big damages award. You will hear many more as we go
14 through the case.

15 By the way, speaking about big damages numbers, Mr.
16 Bauer mentioned that Amazon paid a lot of money to get a
17 license in this case. Well, first of all, don't forget that
18 they were sued and they ended up settling that case for a lot
19 less money than ADREA was originally asking for.

20 But don't be fooled by the amount of money that Amazon
21 paid to settle its litigation with ADREA. As you will hear
22 from the Barnes & Noble witnesses, Amazon is much, much larger
23 than Barnes & Noble in terms of sales of the Kindle and, also,
24 that settlement gave Amazon a license to ADREA's entire
25 portfolio of 300 patents whereas here we are talking about a

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Opening - Mr. Ederer

1 maximum of three patents. So any attempt by ADREA to use the
2 amount of the settlement in Amazon to try to get a big number
3 from you, the jury, is just wrong.

4 As I said before, for all these things that we say
5 Professor Magee did wrong, we will present to you our damages
6 expert Ned Barnes and he will explain all of this very clearly
7 to you and if you use your common sense, we think you will
8 believe Barnes.

9 THE COURT: Counsel, you have about three minutes.

10 MR. EDERER: I just want to wind up.

11 THE COURT: That's fine.

12 MR. EDERER: I just want to very briefly address the
13 issue of willfulness. ADREA is trying to convince you that not
14 only did Barnes & Noble infringe its patents but it did so
15 deliberately. The judge will instruct you later on what
16 willfulness means. But you will hear absolutely no evidence of
17 willfulness in this case. ADREA first contacted Barnes & Noble
18 in 2010. By then Barnes & Noble had already developed and put
19 out several Nook devices, and when it did that, it didn't even
20 know that these patents existed then and it had no reason to
21 know that.

22 Now, Mr. Bauer showed you the infringement letter that
23 was sent to Barnes & Noble in 2012 with these claim charts.
24 Even ADREA agrees that before that date, March 29, 2012, Barnes
25 & Noble couldn't possibly have been deliberately doing

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Opening - Mr. Ederer

1 anything. And, also, that March 2012 claim chart lists six
2 patents that Barnes & Noble was supposedly infringing but we
3 are here today talking about only three. So how were we even
4 supposed to know which patents they were serious about?

5 In any case, Barnes & Noble believes it has good,
6 viable defenses to these claims and we will be presenting these
7 defenses to you. And we believe you will find that these are
8 good faith, legitimate defenses to the claims of patent
9 infringement and if you listen closely to the evidence, we
10 don't think you should find willfulness.

11 Just to wind up now, this case is an important case
12 for Barnes & Noble. We thank you, ladies and gentlemen, for
13 your service. We invite you to pay close attention to all the
14 witnesses for both sides and see whose testimony you think is
15 being consistent and whose is being contradictory.

16 We will try to present things to you as clearly as
17 possible and, as I said before, the idea is for you to use your
18 good old-fashioned common sense to resolve the key issues. And
19 if you do that, we think you're going to find in Barnes &
20 Noble's favor.

21 Thank you.

22 THE COURT: Thank you very much.

23 Ladies and gentlemen, we are going to give you your
24 lunch break at this time. We are only going to go to 4:00
25 today so if you would be back in the jury room promptly at 2:00

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1 we will start promptly then and go to 4. You're excused until
2 then.

3 (Jury exits courtroom)

4 THE COURT: Now, would counsel for Amazon please come
5 forward?

6 MR. KREMER: Good morning, your Honor.

7 THE COURT: Would you identify yourself for the
8 record.

9 MR. KREMER: Paul Kremer, K-R-E-M-E-R, Gibson, Dunn &
10 Crutcher for Amazon.

11 THE COURT: Thank you for being here and for your
12 papers that were submitted.

13 There has been a motion to hold in confidence in one
14 of a variety of ways a number of other items that counsel have
15 expected will come up during the damages phase of the
16 proceeding. My tentative view, which I expressed to the
17 parties here in a telephone conference last week, was to limit
18 that to a narrow range of information. And then when I saw
19 some examples of it in the redacted pretrial consent order, I
20 didn't even see a good reason for keeping that confidential. I
21 haven't ruled finally on their application. But what is it
22 about the information that you want to keep confidential and,
23 admittedly, you're in a better position than they are because
24 you're not a party in the case and had no reason to expect that
25 this problem might arise? What is the reason you want to keep

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1 this confidential?

2 MR. KREMER: Briefly, your Honor, it's information
3 that includes cost factor costs and some profit margin data and
4 some original documents that relate to the Kindle.

5 THE COURT: Their information, not all of it but a lot
6 of it -- just taking, for example, the stuff that was in the
7 pretrial consent order, was information that, essentially, was
8 a subset of information that would normally have been filed
9 with the SEC, things about in common revenues and stuff like
10 that. Are we talking about that in your case?

11 MR. KREMER: Not in our case. We are talking about
12 data that includes a level of granularity that Amazon keeps
13 very close to their vest and wouldn't ordinarily be --

14 THE COURT: What is the harm? Take maybe what you
15 think is your best example -- maybe hand it up since we don't
16 want to resolve the issue by having you reveal it in open court
17 right now -- and then tell me what terrible competitive
18 disadvantage Amazon, which has no market power to speak of, I
19 am sure, would suffer from this.

20 I am looking at the exhibit that you just handed me.
21 Now point me to the line that you're concerned with.

22 MR. KREMER: Your Honor, if you look towards the
23 bottom third of the page there is a heading line of "Total
24 Operating Expenses" and there are some breakouts under that.

25 THE COURT: So I am there.

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1 MR. KREMER: That's an example of documents that are
2 not open to the press and general public and something that
3 Amazon -- if that information were to become available,
4 Amazon's competitors and its partners can use that information
5 not previously available to negotiate different factor cost
6 prices, etc.

7 THE COURT: I have been troubled by this in a
8 conversation I had with the counsel for the parties. The
9 suggestion seems to be that if a company had to negotiate price
10 with someone who actually knew the facts, they would be in a
11 less competitive situation from someone who was in total
12 ignorance. I am sure that's true. If you're negotiating with
13 someone who is in ignorance, you can do better at negotiating a
14 deal than if they know the facts, but I am a little unclear why
15 that is a legitimate concern for a court.

16 MR. KREMER: I think there is a deep question there,
17 your Honor, and I am loath to opine on the philosophy that
18 underpins private actors negotiating based on somewhat
19 asymmetrical information. I can say that Amazon's business
20 partners, to our knowledge, would make similar motions if it
21 was their information that it would be presented --

22 THE COURT: I understand it's like you're playing
23 poker, no one wants to show their hand, but I am not sure
24 that's the kind of game we are involved in, in a public trial.

25 Let me ask you this. One possibility that I was

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1 exploring with counsel was that, because the jury may need to
2 see the information, that we would put it up on the screen so
3 that they could see it on their screens but we would not put it
4 on the public screen that's right over there or the one right
5 up here, and to the extent it was marked as an exhibit, it
6 could be redacted for all purposes except for the jury's view.
7 They could get it when they are deliberating and, if they
8 wanted to, they could get an unredacted copy. So would that
9 solve your problem?

10 MR. KREMER: Absolutely.

11 THE COURT: All right. I am not sure whether this is
12 going to even come up.

13 Let me ask the parties. Are the exhibits that Amazon
14 is concerned with ones that in fact are likely to come into
15 evidence?

16 MR. SHARIFAHMADIAN: Your Honor, we are open to
17 preparing summaries based on the underlying documents so that
18 the extent of the information is also reviewed, some of the
19 cost factors.

20 THE COURT: Why don't we do this. I don't want to
21 deprive you of your lunch either. Why don't you over the next
22 day or two see if the two sides can work out a summary that
23 they would be comfortable with and if that's agreeable to
24 Amazon. If you don't have an agreement, then I will notify
25 Amazon's counsel -- I will ask the parties to notify me at

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1 least 24 hours before any such evidence is going to be offered
2 and then I will notify counsel so that you can come in
3 beforehand, if I don't go the route that I am thinking of
4 going. So I suspect you should probably give your name and
5 phone number to my law clerk, although I have heard of Gibson
6 Dunn -- I think it's a small but lovable firm here in New York
7 and elsewhere.

8 Anything else we can take up?

9 MR. BAUER: One small thing. Juror number 2 seems to
10 have a pad and has been taking extensive notes.

11 THE COURT: Yes. That's fine with me.

12 MR. BAUER: We had asked if we could give the jurors
13 notebooks and no one else has one.

14 THE COURT: I hadn't noticed that, but I will have my
15 courtroom deputy, when they come back in the jury room say,
16 anyone who wants to take notes is free to do so. And then I
17 will give them an instruction about it's perfectly fine to take
18 notes, although it's perfectly fine not to take notes.

19 MR. BAUER: That's fine. It was just that she was the
20 only one taking notes.

21 THE COURT: I can't understand it because it was just
22 mesmerizing, both opening statements. Actually, I don't mean
23 to be snarky; they were fine opening statements, and I much
24 appreciate both of them.

25 All right. We will see everyone at 2:00.
(Luncheon recess)

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AFTERNOON SESSION

2:00 p.m.

(Jury not present)

THE COURT: Let's bring in the jury. We have the schedule for next week, which we will give to them. Is the first witness in the courtroom? We'll call you up in just one minute.

(Jury present)

THE COURT: Please be seated. Ladies and gentlemen, a couple of things. First, as you are all now aware, it is perfectly permissible to take notes. On the other hand, it is also perfectly permissible not to take notes. When this case is given to you for your deliberations, if you have any question about precisely what was said by a particular witness, don't rely on your notes. Send us a note, and we will get you the actual transcript of what that person said.

The notes you are taking now may be very useful to you for evaluating the case or remembering the issues generally. I just want to be sure you understand that if there is something very specific -- let's say you're in the jury room and one of you says, my notes says that he said X and the other person says no, my note says he said Y -- you don't have to debate about it. All you have to do is send us a note, and we will send you the actual transcript of what he said.

Yes, sir?

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1 A JUROR: Do we need to take down who is speaking and
2 on what day or times to clarify for you?

3 THE COURT: If you want. On your notes you can write
4 down anything you want. You can write down, gee, the judge's
5 jokes are really bad, or anything you want. It's up to you.

6 Secondly, in terms of our schedule, because I think
7 you need to know that, we will sit tomorrow from 9:00 to 4:00
8 again. We will end at 4:00. We will not sit on Thursday or
9 Friday. Just so you know that counsel are very hard-working, I
10 will be conducting a hearing on some legal issues on Friday,
11 but they don't concern you. It is not like we are taking
12 Friday off or anything like that.

13 Monday is a court holiday, Columbus Day. We will sit
14 on Tuesday but beginning at 2 o'clock. We will sit in the
15 afternoon. We will go all the way to 5 o'clock. So it will be
16 a half day. That is totally my fault. I have to give a speech
17 at Fordham Law School in the morning. So we will sit from 2:00
18 to 5:00 on Tuesday.

19 We will sit all day Wednesday, 9:00 to 5:00. We will
20 sit on Thursday 10:00 to 4:00 because of other matters I have
21 to take up, 10:00 to 4:00 on Thursday. And, depending how
22 things are going, we might have to sit Friday morning. We will
23 not sit Friday afternoon in any event. We might have to sit
24 Friday morning. If things are moving swiftly, we may not have
25 to do that.

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1 If we go into the following week, we would sit on
2 Monday from 9:00 to 5:00, we would sit on Tuesday from 9:00 to
3 5:00, and we would sit on Wednesday from 9:00 to 5:00. I am
4 very, very confident that by October 22nd this case will be
5 completed.

6 The one thing I can't control is how long it takes you
7 to deliberate. That is totally within your power. But in
8 terms of everything else, I'm sure we will be finished with the
9 evidence long before October 22nd. I want to allow some time
10 for your deliberations, but I can't totally control that.

11 That is the schedule on the case.

12 Time to call our first witness.

13 MR. CABRAL: Your Honor, the plaintiff will call Talal
14 Shamoon as our first witness.

15 THE COURT: I need to mention to plaintiff's counsel,
16 I am shocked that you are a lawyer because you have a very soft
17 and pleasing voice. But you need to speak louder so that
18 everyone in this courtroom can hear you.

19 MR. CABRAL: Yes, your Honor.

20 TALAL SHAMOON,

21 called as a witness by the plaintiff,

22 having been duly sworn, testified as follows:

23 THE CLERK: Please be seated. State your name and
24 spell it slowly for the record.

25 THE WITNESS: My name is Talal Shamoon. T-A-L-A-L

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1 S-H-A-M-O-O-N.

2 MR. CABRAL: Your Honor, we have a witness binder for
3 the witness. With your permission, I would like to hand it to
4 the witness so I don't have to walk back and forth.

5 THE COURT: Yes, absolutely.

6 MR. CABRAL: Thank you, your Honor.

7 DIRECT EXAMINATION

8 BY MR. CABRAL:

9 Q. Good afternoon, sir.

10 A. Hello.

11 Q. Can you please introduce yourself to the jury.

12 A. I'm Talal Shamon. I'm the president of ADREA. I'm also
13 the CEO of Intertrust Technologies Corporation, which is one of
14 the shareholders in ADREA and also the company that manages
15 ADREA on a daily basis.

16 Q. Let's talk first about Intertrust. Can you tell the jury a
17 bit about the company.

18 A. Intertrust is a company that's been around for a while, at
19 least by Silicon Valley standards. It was founded in 1990 by
20 this brilliant man called Victor Shear, who realized that as
21 people like us use computers more and more to exchange
22 information, buy music, read books, the way computers were
23 built wasn't really set up for people to conduct commerce. The
24 likelihood people would take personal information and money and
25 cheat each other and stuff was very high. The way people used

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Shamoon - direct

1 to protect computers was lock them in a room and try to protect
2 access.

3 THE COURT: Counsel, I'm very sorry, but I need to
4 have counsel approach the side bar.

5 (Continued on next page)

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Shamoon - direct

1 (At the side bar)

2 THE COURT: First, by and large I will not intervene
3 without an objection from an adversary, because this is
4 ultimately an adversary process. On the other hand, we might
5 as well not get things off on the wrong foot.

6 The history of the founder of this company is of zero
7 relevance to any issue in this case. Even the history of the
8 company is of only modest relevance. Although, of course, the
9 more you go into that, the more you open the door to some of
10 the stuff that your adversary is undoubtedly going to want to
11 get into about patent trolls, not in those words, of course,
12 but which I otherwise would have some doubts about how much he
13 could get into.

14 Moreover, aside from the irrelevancy, we can't have
15 these kinds of narratives that just go on for minutes and
16 minutes or we will never finish this case. I just told the
17 jury when we are going to finish it, and we are going to finish
18 it in that time frame.

19 So, I think you need to make your questions a little
20 more pointed, not leading but pointed. Secondly, if your
21 witness does launch into a narrative, I expect counsel to
22 object.

23 MR. EDERER: I was about to stand up, your Honor.

24 THE COURT: Very good.

25 MR. CABRAL: Your Honor, one additional point, if it's

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Shamoon - direct

1 OK, so as not to have another side bar. There was an issue
2 with regard to one of the motions in limine on the 2009
3 Intertrust agreement. My understanding and my reading of the
4 motion was to exclude a document from evidence. We don't plan
5 to introduce the document into evidence, and we actually never
6 did. But I would like to ask the witness a few basic questions
7 factually about any market assessment that was done prior to
8 Intertrust's investment in ADREA, if that's OK with the Court.

9 THE COURT: What is the relevance?

10 MR. CABRAL: The relevance is that it relates to
11 information relied on by our expert. This was the subject of
12 one of the Daubert motions, actually.

13 THE COURT: If I agree to allow your expert to get
14 into it, I will allow your expert, through hearsay, which is
15 permissible with experts, to get into all the background. I
16 don't think we need to get into it here.

17 MR. CABRAL: One of the issues is whether the person
18 who developed it is a qualified expert. This would be an
19 opportunity for me to establish who that person was who created
20 the presentation and whether he was qualified.

21 THE COURT: Wait a minute. This is a question in the
22 Daubert area?

23 MR. CABRAL: Yes.

24 THE COURT: If your expert doesn't know the answer to
25 that, it is irrelevant that this guy knows it.

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Shamoon - direct

1 MR. CABRAL: I think our expert does know the answer
2 to it. That is what is being challenged by Barnes & Noble.

3 THE COURT: If that becomes a matter of great moment,
4 this guy is obviously available. We can recall him or I can
5 hear him outside the presence of the jury during a telephone
6 interview during the Daubert hearing if that is necessary. I
7 don't think you need to get into it here.

8 I don't really understand, please explain to me, what
9 the history of any of these companies -- if we go into the
10 history, we will be here for two weeks just on that -- has to
11 do with anything.

12 MR. CABRAL: The question I asked him was just tell me
13 a bit about the company, and he went into it.

14 THE COURT: All right. Why don't you ask him to talk
15 a bit about ADREA. That would be permissible.

16 MR. CABRAL: Very well, your Honor. Thank you.

17 (Continued on next page)
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Shamoon - direct

1 (In open court)

2 MR. CABRAL: We will pick up where we left off, your
3 Honor, if that's OK?

4 THE COURT: Why don't you put a new question.

5 Q. How long have you been CEO of Intertrust?

6 A. I became CEO of Intertrust in early 2003.

7 Q. What are your job responsibilities at Intertrust, briefly,
8 if you could?

9 A. I manage the company of about 150 people. It does research
10 and development, technology development, licensing of various
11 technologies, and we have a small venture capital fund. We
12 invest in startups and foreign little companies.

13 Q. Does Intertrust employ any engineers?

14 A. Intertrust employs a large number of --

15 MR. EDERER: Objection, your Honor: Relevance.

16 MR. CABRAL: Your Honor, I'd be happy to address the
17 objection.

18 THE COURT: But I wouldn't be happy to have you do
19 that. Sustained.

20 Q. When did you join Intertrust?

21 A. I joined Intertrust in July of 1997.

22 Q. What were you doing before you joined Intertrust?

23 A. I was a research scientist --

24 THE COURT: Are you employed by the plaintiff in this
25 case, ADREA? I'm asking the witness.

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Shamoon - direct

1 THE WITNESS: ADREA pays Intertrust for services.

2 Part of my pay comes from a payment from ADREA.

3 Q. What is your title with Intertrust?

4 A. I'm the chief executive officer of Intertrust.

5 Q. Do you have a title with a address?

6 A. I use the title of president at ADREA. I'm in charge of it
7 and I run it and I manage it.

8 MR. CABRAL: Your Honor, I will get into the history
9 of ADREA in one moment.

10 THE COURT: OK.

11 Q. Can you tell the jury a bit about your educational
12 background.

13 A. I have three degrees from Cornell University: A
14 Bachelor's, a Master's, and a Ph.D in electrical engineering.

15 Q. Let's talk about ADREA. What is ADREA?

16 A. ADREA is a company that is owned by four shareholders: My
17 company Intertrust, Sony, Philips, and Discovery Networks. It
18 is a company that was put together by a group of partners to
19 try to facilitate licensing and technology development and what
20 we call interoperability in the electronic book space.

21 Q. Who are the shareholders in ADREA?

22 A. I'll repeat what I just said. It's Sony, Philips,
23 Discovery Networks, and Intertrust.

24 Q. Does each member have an equal share in the company?

25 A. Yes. We each own 25 percent.

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Shamoon - direct

1 Q. You mentioned that Intertrust provides certain services to
2 ADREA. What kind of services are those?

3 A. We manage the company, we conduct sales, business
4 development, we do strategic planning, and we do licensing, and
5 obviously accounting and everything else that is required to
6 run a company.

7 Q. Is Intertrust in the licensing business?

8 A. Intertrust is in the licensing business. We conduct
9 licensing, both software and patents, and we run what we call
10 trust services, which is we license keys that go into things
11 like phones and TVs that allow them to buy content and other
12 things.

13 Q. Very briefly, if you could tell the jury a bit about
14 Intertrust's experience with licensing patents.

15 MR. EDERER: Objection, your Honor. This isn't about
16 Intertrust.

17 THE COURT: I think that the defendant's opening
18 waived the otherwise valid objection that is now being made to
19 this particular question. Overruled.

20 Q. Let me repeat the question. Very briefly, if you could
21 tell the jury about Intertrust's experience with licensing
22 patents.

23 A. Intertrust has a long history of licensing patents. I
24 think it is public that we have made over a billion dollars
25 from licensing patents over the last 12 or 15 years.

Ea7radr4

Shamoon - direct

1 Q. Were you involved in the creation of ADREA?

2 A. Yes, I was.

3 Q. When was ADREA ultimately informed?

4 A. ADREA was formed I believe in 2010.

5 Q. Again briefly, if you could please tell the jury how you
6 came up with the idea to form the company.

7 A. I don't want to take too much time. There was a guy at
8 Discovery Networks called Jay Rosenstock, who still works
9 there, who used to work at Sony. He is an old friend of mine.
10 He called me in the summer of 2009, right after he had moved
11 from Sony to Discovery. His job at Discovery was to handle
12 business strategy and what they call corporate development.

13 One of his jobs was to deal with this patent case that
14 Discovery had filed against Amazon that was using the patents
15 of the founder of Discovery Networks, guy called John
16 Hendricks, that were on ebooks that John had filed in the mid
17 '90s. Discovery is a content company. They make shark
18 documentaries and things like. Jay had been asked by his boss
19 to see if there was a way to use this patent portfolio that he
20 had invented strategically.

21 Jay knew that I knew a lot about patents, and he knew
22 that I worked with people at Sony and Philips spending a lot of
23 time on research. Sony had an ebook reader in the market at
24 that time. He called me up and said, hey, look --

25 MR. EDERER: Objection, your Honor.

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Shamoon - direct

1 THE COURT: Sustained.

2 A. He called me and said, do you have any idea --

3 THE COURT: No, no.

4 Q. I will ask you another question.

5 THE COURT: Yes.

6 Q. What was the plan, what was your plan, for ADREA's business
7 when you formed the company?

8 A. I was presented with the opportunity to gather inventions
9 from three companies that were active in the space. Philips
10 had a research labs, one of the great research labs of the 20th
11 century. Sony had obviously done a lot of technology in this
12 area.

13 MR. EDERER: Objection.

14 THE COURT: I need to maybe make the witness aware of
15 the rules of evidence. This is not like an everyday
16 conversation. Your opinions, your views of what Philips'
17 history was, your views of what the founder of your company was
18 like, none of that comes into evidence. What you need to
19 report is simply facts that you either saw or heard or
20 participated in, very simple facts. That's all we need.

21 It's not easy. Everyday conversation isn't like that.
22 But this is the way we work it here because we are engaged in a
23 very important matter, a lawsuit, not an everyday conversation.
24 See what you can do to keep it within those confines.

25 THE WITNESS: I'll do my best. Sorry.

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Shamoon - direct

1 THE COURT: No problem.

2 BY MR. CABRAL:

3 Q. I'll try to get at the same subject matter in a more direct
4 way. Can you please list for the jury what your plans were for
5 the company.

6 A. My plan for the company was to create an entity that helped
7 people trying to distribute electronic books and make devices
8 or apps that read electronic books work better, and also to
9 make it, at least over time, make it so that consumers wouldn't
10 be gate-kept by one company selling books in what I call the
11 silo, where you have a bookstore and a device made by the same
12 person and you're locked into that bookstore, kind of like what
13 you have with the Kindle and the Amazon bookstore or the iPad
14 and the Apple bookstore.

15 Q. When did you first have discussions about forming ADREA?

16 A. In the summer of 2009.

17 Q. Did any other companies or individuals become involved in
18 that conversation regarding the formation of ADREA?

19 A. Over the course of the summer and the fall of 2009, we
20 approached Sony, and they became interested. Then we
21 approached Philips, and they became interested.

22 MR. CABRAL: Your Honor, with your permission, I would
23 like to show the witness what's been marked for identification
24 as Exhibit JTX-009, which is a joint exhibit on the parties'
25 joint exhibit list.

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Shamoon - direct

1 THE COURT: Go ahead.

2 MR. CABRAL: Your Honor, I don't know if you prefer
3 courtesy copies. I have extra copies here if you would like to
4 see them.

5 THE COURT: Sure.

6 MR. CABRAL: With your permission, may I approach?

7 THE COURT: Yes. If it is a joint exhibit, it will,
8 upon presentation to a witness, be deemed to have been received
9 in evidence, so we don't have to go through offering and any
10 objection, because this is a joint exhibit. So Joint Exhibit 9
11 is received.

12 (Joint Exhibit 9 received in evidence)

13 MR. CABRAL: Thank you, your Honor.

14 Q. Have you seen this document before, sir?

15 A. Yes, I have.

16 Q. What is it?

17 A. It's the agreement between the four companies I mentioned
18 earlier to form this company ADREA.

19 Q. Can you please tell the jury the purpose of this agreement.

20 A. When we formed the company, obviously, we had to agree on
21 certain principles about how we would run the company, what the
22 company's mission would be, how we would fund it, and then deal
23 with whatever money it made if it made any money.

24 Q. I now want to direct your attention to an exhibit that's
25 been marked for identification as Exhibit JTX-010.

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Shamoon - direct

1 THE COURT: JTX010, by that I take it you mean Joint
2 Exhibit 10?

3 MR. CABRAL: Joint Exhibit 10, your Honor, yes. I'll
4 change my terminology. Your Honor, with your permission, can I
5 approach?

6 THE COURT: Yes. Joint Exhibit 10 is received.

7 (Joint Exhibit 10 received in evidence)

8 Q. Sir, my first question to you is, have you seen this
9 document before?

10 A. Yes, I have.

11 Q. What is it?

12 A. It's a follow-on agreement from the one you just showed me.

13 Q. We have no page numbers on this document, unfortunately.
14 If you could please turn to the page marked at the bottom with
15 ADREA 19363.

16 A. You said 19363?

17 Q. That's correct.

18 A. I guess it's on my screen.

19 Q. Are you there?

20 A. Yes.

21 Q. On this page do you see the heading of section 5.1 that
22 says "Contribution of the Members"? Do you see that?

23 A. Yes, I do.

24 Q. Can you please tell the jury very briefly in general terms
25 what is being discussed here in section 5.1.

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Shamoon - direct

1 A. Yes.

2 MR. EDERER: Objection, your Honor. The document
3 speaks for itself.

4 THE COURT: While of course that is true, it speaks in
5 this case endlessly, so I will allow the witness to answer.

6 A. This is what I sort of call myself the splits-the-bill
7 section. This says that we value the company at a certain
8 amount of money, we just agreed that each party put \$5 million
9 down on the table to get the engine running. Intertrust put
10 5 million in cash in, and the other parties put \$5 million of
11 value in terms of patent contribution.

12 Q. Can you please explain to the jury how the investors
13 arrived at that \$5 million amount.

14 A. We had no way of really telling sort of how to really value
15 the company beyond just figuring out how much money we
16 thought -- how much cash we needed to run the company until the
17 engine started and it could fund itself. My team determined it
18 would cost around \$5 million. We said, look, we need
19 \$5 million in cash, and if we each want to own this four ways,
20 then everybody else put in \$5 million of value, and we will go
21 from there.

22 Q. If you could turn to Exhibit A. This is actually Exhibit A
23 of Joint Exhibit 10. It is kind of confusing. It is towards
24 the end of the document.

25 A. OK.

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Shamoon - direct

1 Q. I believe it begins on the page marked at the bottom ADREA
2 19397. Do you see that?

3 A. I've got it here, yes.

4 Q. Very briefly, could you tell the jury what is shown here in
5 Exhibit A.

6 A. It's just what I said. It just says that we are going to
7 each share the company four ways equally and we are each going
8 to own 25 percent.

9 Q. If you could briefly take a look at Exhibits B, C, and D of
10 Joint Exhibit 10. I won't make you go through each page here.
11 My question for you is, what is being shown here in Exhibits B,
12 C, and D?

13 A. I'm looking at B.

14 Q. Why don't we start with Exhibit B.

15 A. These are lists of patents that were contributed. B is the
16 list of Discovery patents that were contributed.

17 Q. What is shown on Exhibit C?

18 A. Exhibit C is the list of Philips patents being contributed.

19 Q. What is shown in Exhibit D of Joint Exhibit 10?

20 A. The one that is on the screen the same, but it is the Sony
21 patents that are being contributed.

22 Q. Now I would like to show you several documents that have
23 been marked as Joint Exhibit 1, Joint Exhibit 2, and Joint
24 Exhibit 3.

25 THE COURT: Those are received.

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Shamoon - direct

1 (Joint Exhibits 1, 2, and 3 received in evidence)

2 Q. Dr. Shamoon, do you recognize these documents?

3 A. These are the actual patents that are in the suit.

4 Q. Let's take a look at the documents marked as Joint Exhibit
5 1 and Joint Exhibit 2. That is the '851 and '501 patents
6 respectively. Can you tell the jury briefly what you know, if
7 anything, about these patents.

8 A. I recognize these to be -- at least 1 is one of the
9 Hendricks patents from Discovery and 2 is another Hendricks
10 patent from Discovery.

11 Q. If you can turn your attention briefly to Joint Exhibit 3,
12 can you please tell the jury a bit about what you know about
13 this patent.

14 A. This is one of the patents in the suit. It is one of the
15 patents that Philips contributed from Mr. Shteyn.

16 Q. Are these patents owned by ADREA?

17 A. These patents are owned by ADREA.

18 Q. If we can talk a bit about ADREA's business. Can you
19 briefly explain for the jury about the market for ebooks and
20 ebook viewers in 2009.

21 A. The market for ebooks and ebook viewers in 2009 was --

22 MR. EDERER: Objection, your Honor: No foundation.

23 THE COURT: Sustained.

24 Q. Dr. Shamoon, are you familiar with the market for ebooks
25 and ebook viewers in 2009, when you began discussions about

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Shamoon - direct

1 forming ADREA?

2 A. Yes.

3 Q. Can you please tell the jury a bit about what you know
4 about the market at that time.

5 MR. EDERER: Same objection.

6 THE COURT: Same ruling.

7 BY MR. CABRAL:

8 Q. Just one moment, sir. Do you know who competes in the
9 market for electronic books and electronic book viewers in
10 today's market?

11 A. Yes.

12 Q. Who competes in the market?

13 A. The main players are Amazon, Barnes & Noble, and, depending
14 on the geography, I guess the third most dominant party is a
15 company called Kobo. That was a Canadian company that was
16 bought by a large Japanese company called Rakuten that has a
17 lot of stores around the world and some electronic commerce
18 activities as well.

19 Q. Do any of the companies you just mentioned have a license
20 to ADREA's patents?

21 A. Amazon does. But if I could go back. There is also
22 other -- I don't know how much you guys want me to talk about
23 the market.

24 THE COURT: The answer to that is, since there was an
25 objection raised and I sustained the objection, the amount you

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Shamoon - direct

1 can discuss the market currently under the present questions
2 that have been permitted is not at all.

3 THE WITNESS: OK.

4 BY MR. CABRAL:

5 Q. I would like to hand you a document that has been
6 identified as Joint Exhibit 32.

7 MR. CABRAL: Your Honor, with your permission, may I
8 approach?

9 THE COURT: Yes. 32 is received.

10 (Joint Exhibit 32 received in evidence)

11 MR. CABRAL: This is Joint Exhibit 32, your Honor.

12 Q. My question to you, Dr. Shamoon, is do you recognize this
13 document?

14 A. Yes, I do.

15 Q. What is it?

16 A. It's the license agreement we have with Amazon.

17 Q. Were you involved in the negotiation of this agreement?

18 A. Yes, I was.

19 Q. Can you very briefly summarize for the jury the purpose of
20 this document.

21 A. This is a document that is a contract between Amazon and
22 ADREA that provides them with a license to all of the patents
23 in the ADREA portfolio. When we formed ADREA there was a
24 lawsuit going on, this document also settled that lawsuit with
25 Amazon. So it halted all litigation.

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Shamoon - direct

1 Q. Did ADREA sue Amazon?

2 A. Actually, Discovery sued Amazon. We took over the suit
3 against Amazon because we basically bought those patents into
4 ADREA.

5 Q. Can you briefly explain for the jury how ADREA ended up in
6 the lawsuit between Discovery and Amazon.

7 A. As I said, Discovery had sued Amazon, and when we formed
8 ADREA, we took over the patents. There were more patents than
9 there were in the Amazon suit, but we took on responsibility
10 for that case.

11 Q. Do you know if Amazon also sued Discovery?

12 A. Yes, Amazon had sued Discovery back when Discovery had sued
13 them.

14 Q. What, if anything, do you know about that lawsuit?

15 A. We knew it was there. We didn't take responsibility for
16 it. Discovery continued to defend themselves. Again, I think
17 Amazon had some patents on some website that Discovery had, and
18 they sued them back.

19 Q. Without going into actual numbers, can you give the jury a
20 brief description of the terms of the Amazon license.

21 A. Amazon paid us a certain amount of money for a license for
22 all the patents we had. The way they did it was they --
23 remember, there were three patent portfolios in ADREA. One was
24 from Discovery, one was from Sony, one was from Philips. What
25 they said was since we have been sued with Discovery patents,

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Shamoon - direct

1 we would like a license to the whole Discovery patent
2 portfolio, we will pay you a certain amount of money for that.
3 Then they said, look, we would like some more time to think
4 about whether we need a patent license --

5 MR. EDERER: Objection, your Honor, as to what Amazon
6 was saying.

7 THE COURT: Sustained.

8 Q. Without getting into any discussions between you and Amazon
9 during the negotiations, could you briefly summarize the terms
10 of the final deal between ADREA and Amazon.

11 A. They took a license to Discovery patents, and then they had
12 an option to take a license to the rest of the portfolio.
13 There were two payments. The second one was optional. They
14 exercised both. They took a license to the entire ADREA
15 portfolio, all of the patents in it, eventually.

16 Q. When did Amazon exercise its option to the license that you
17 referred to?

18 A. Last fall.

19 MR. CABRAL: Your Honor, could we approach side bar?

20 THE COURT: Yes.

21 (Continued on next page)
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Shamoon - direct

1 (At the side bar)

2 MR. CABRAL: I would like to show the numbers of the
3 agreement. I also want to comply with your ruling earlier.
4 The Amazon attorney limited his argument to the costs and sales
5 data of Amazon. But he also moved in theory -- included in the
6 motion was the financial terms of this agreement as well.
7 Although it wasn't discussed between you and the Amazon
8 attorney, I don't want to not follow --

9 THE COURT: I will allow that. I asked him for his
10 most, if you will, best case, and that is where he limited it
11 to costs and so forth. Nevertheless, I really think his
12 request in this respect would have been overbroad, so I will
13 allow those questions to be put. Be sure you cut off the
14 witness if he gets into anything that is more narrowly still
15 the subject of the motion.

16 MR. CABRAL: If it is OK, I will just ask him what the
17 amounts paid by Amazon were.

18 THE COURT: Yes, that is permissible.

19 MR. CABRAL: Thank you, your Honor.

20 (Continued on next page)

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Shamoon - direct

1 (In open court)

2 BY MR. CABRAL:

3 Q. Dr. Shamoon, can you please turn to page 4 of the Amazon
4 agreement.

5 A. The which?

6 Q. Page 4 of the Amazon agreement, which I believe is Joint
7 Exhibit 32. I want to direct your attention to paragraph 3.

8 A. Yes.

9 Q. Do you see the paragraph titled "Settlement Payment"?

10 A. Yes, I do.

11 Q. How much did Amazon pay ADREA for a license to the
12 Discovery portfolio?

13 A. It's there on the screen. It's \$10 million.

14 Q. Is this the provision of the Amazon agreement that reflects
15 the terms of that payment?

16 A. Yes.

17 Q. If you could now turn to page 6 of the Joint Exhibit 32,
18 which is the Amazon agreement.

19 A. Yes.

20 Q. I want to direct your attention to paragraph 6.1 on the
21 bottom of page 6 that carries over to the next page. Do you
22 see the section 6.1 under "Option to License"?

23 A. Yes, I see it.

24 Q. Does that provision reflect the terms of Amazon's optional
25 license to the ADREA portfolio?

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Shamoon - direct

1 A. Yes, it does.

2 Q. How much did Amazon pay ADREA for a license to the optional
3 patents that you see here referred to in paragraph 6.1?

4 A. They paid \$2½ million for that option.

5 Q. During the course of your license negotiations with Amazon,
6 were those negotiations reflected -- sorry -- affected by the
7 underlying litigation? If you could limit your answer to your
8 perspective, from ADREA's perspective.

9 MR. EDERER: Objection, your Honor: Vague.

10 MR. CABRAL: No problem. I'll re-ask the question,
11 your Honor.

12 Q. Were your licensing discussions or negotiations with Amazon
13 affected by the underlying litigation between Amazon and
14 Discovery?

15 A. We were in court, and at a relatively early point in the
16 suit we, both us and Amazon, decided to sit down and see if we
17 could sort it out and end what was proving to be a complicated
18 and expensive lawsuit. We sat around a table and negotiated a
19 settlement. We ended the lawsuit as a result.

20 Q. I would like to direct your attention to page 6 of Joint
21 Exhibit 32, specifically section 4.6. The last sentence in
22 that paragraph states that the parties acknowledge and agree
23 that the payment does not represent a reasonable royalty for
24 the licenses and other rights granted hereunder to Amazon. Do
25 you see that?

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Shamoon - direct

1 A. Yes.

2 Q. What is your understanding of what that language means?

3 A. To me, what that language meant was that since we had
4 settled out of court and there was an exchange of value, this
5 would outline the fact that there were certain discounts and
6 things that were given to Amazon that didn't represent a
7 standard for the market.

8 MR. EDERER: Objection.

9 THE COURT: Sustained, and the jury will disregard the
10 last answer, which is stricken.

11 Q. Did Amazon take a license to ADREA's entire patent
12 portfolio?

13 A. Yes, they did.

14 Q. Why did you agree to license ADREA's entire patent
15 portfolio to Amazon?

16 A. That was part of the settlement agreement. They wanted to
17 license the whole portfolio, and that was built into the deal.

18 Q. I want to talk to you now about Barnes & Noble. Has ADREA
19 ever talked with Barnes & Noble about taking a license to the
20 patents-in-suit?

21 A. Yes, we talked to them many times before we ended up in
22 court.

23 Q. Very briefly, can you summarize those discussions for the
24 jury.

25 A. We approached Barnes & Noble I think starting in the 2010

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Shamoon - direct

1 time frame. I could be fuzzy about the dates. We made
2 repeated attempts to try to license Barnes & Noble without
3 having to go to court. We explained to them what our business
4 model was. We made a series of proposals. It was difficult to
5 get meetings, but we did, and we talked back and forth. After
6 a long time, we realized that they weren't willing to take a
7 license through an out-of-court negotiation, and we had no
8 choice but to take legal action, which is why we are here
9 today.

10 Q. I am going to hand you two documents that have been
11 identified as Joint Exhibits 21 and 22.

12 MR. CABRAL: Your Honor, with your permission, may I
13 approach?

14 THE COURT: Yes. 21 and 22 Joint Exhibits are
15 received.

16 (Joint Exhibits 21 and 22 received in evidence)

17 Q. Let's start with Joint Exhibit 21, if we can. Dr. Shamoon,
18 have you seen this document before?

19 A. Yes, I have.

20 Q. What is it?

21 A. An email from a gentleman called Shawn Ambwani, who used to
22 work for us in licensing. It's an email from him to a
23 gentleman called Mr. Snowe, who used to be the person in charge
24 of intellectual property at Barnes & Noble. It's one of the
25 communications we had with them offering them a license and

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Shamoon - direct

1 asking them to take a license to the patents.

2 Q. You may have touched on this briefly, but who is Shawn
3 Ambwani?

4 A. Shawn Ambwani was an executive both at Intertrust and he
5 supported ADREA as well. His job was to conduct licensing
6 activities for the company. He was our salesperson.

7 Q. How long have you known Mr. Ambwani?

8 A. I've known Mr. Ambwani since around 2000.

9 Q. Does Mr. Ambwani have a technical background?

10 A. I think he has an undergraduate degree in mathematics.

11 MR. EDERER: Objection, your Honor.

12 THE COURT: Sustained.

13 Q. Was Mr. Ambwani employed by ADREA?

14 A. He was employed by ADREA the same way I'm employed by
15 ADREA. We were paid a services agreement to support ADREA's
16 business functions. He wore an ADREA hat and he worked for
17 ADREA.

18 Q. Did he have a title with ADREA?

19 A. I think the title is, I think he used the title of VP of
20 licensing. Yes, that's what's on the bottom of this email, if
21 you scroll down.

22 Q. Did you ever ask Mr. Ambwani to determine the value of
23 ADREA's patent portfolio or any of its individual patents?

24 A. I did not. He wasn't qualified to do that, in my opinion.

25 MR. EDERER: Objection.

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Shamoon - direct

1 THE COURT: Sustained.

2 Q. If you could limit your answer to yes or no. Did you ever
3 ask Mr. Ambwani to determine the value of ADREA's patent
4 portfolio or any of its individual patents?

5 A. No.

6 Q. Without going into your characterization of Mr. Ambwani's
7 qualifications or lack thereof, can you tell the jury why you
8 didn't ask him to do that.

9 A. His job was to really handle sales. We had other experts
10 to do that.

11 Q. Directing your attention to Joint Exhibit 21, do you
12 recognize any of the names of the recipient on this March 29,
13 2012 email?

14 A. I recognize Mr. Feuer, who is currently general counsel of
15 Barnes & Noble. I think Mr. DeFelice was the general counsel
16 at Barnes & Noble. I know he was a legal executive there.

17 Q. Do you know if the recipients of this email were employees
18 of Barnes & Noble?

19 A. I know that Mr. Snowe and Mr. DeFelice were.

20 Q. I'm going to show you -- if you can direct your attention,
21 rather, to Joint Exhibit 22.

22 A. OK.

23 Q. Have you seen this document before?

24 A. Yes.

25 Q. What is it?

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Shamoon - direct

1 A. It's a presentation, a PowerPoint or some kind of document
2 that shows the ADREA patents and how they map, what we say map
3 against Barnes & Noble products. That is fairly conventional
4 way of showing someone you would like to take a license to a
5 patent portfolio why the patent enables their product.

6 Q. I want to direct your attention to page 3 of this document,
7 Joint Exhibit 22.

8 A. Page 3?

9 Q. Right.

10 A. OK.

11 Q. I'm not going to ask you a question about every page on
12 this, but if you could briefly take a look at pages 3 through
13 10 and tell the jury what is shown in that section of this
14 document.

15 MR. EDERER: Objection, your Honor: No foundation as
16 to this witness's knowledge of this document or what he had to
17 do with preparing it.

18 THE COURT: If you can establish a foundation, I'll
19 permit the question. But on the present showing, the objection
20 is sustained.

21 Q. Dr. Shamoon, do you know what this document is?

22 A. Yes.

23 Q. Are you familiar with this document?

24 A. Yes.

25 Q. When did you first become familiar with this document?

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Shamoon - direct

1 A. I reviewed it after it was prepared, before it was sent to
2 Barnes & Noble.

3 Q. So you did have a chance to review this document before it
4 was provided to Barnes & Noble?

5 A. Yes, I think I did.

6 Q. Going back to my original question on what is shown on
7 pages 3 through 10 of this document, could you please tell the
8 jury briefly what is shown on these pages.

9 MR. EDERER: Same objection, your Honor.

10 THE COURT: Overruled.

11 Q. You may answer.

12 A. Can I answer?

13 Q. Yes.

14 A. As I said, it takes the language from the patent and shows
15 the product and it maps the patent onto the product.

16 Q. What patent are you referring to specifically?

17 A. There are different patents here. These go on about the
18 '851. You asked me to look at pages 3 through 6, right?

19 Q. 3 through 10, please?

20 A. 3 through what?

21 Q. Through 10.

22 A. 10. Yes, they call the '851 patent. Yes.

23 Q. If you could direct your attention to page 17 of the same
24 document. That is Joint Exhibit 22. I'll ask you a similar
25 question. Can you briefly tell the jury what is being shown on

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Shamoon - direct

1 pages 17 through 24 of Joint Exhibit 22.

2 A. Page 17 through 24?

3 Q. That's right.

4 A. Yes, it is the same thing. It's a map from another patent,
5 what they call the '501 patent, onto some Barnes & Noble
6 products. Again, it shows the correspondence between what is
7 invented and what Barnes & Noble sells.

8 Q. Finally, if you could direct your attention to page 25 of
9 the same document.

10 A. OK.

11 Q. What patent is being discuss discussed on pages 25 through
12 30 of Joint Exhibit 22?

13 A. It's the same concept, maps between what is called the '703
14 patent and Barnes & Noble products and how the patent
15 corresponds as to what was invented.

16 Q. With respect to the three patents we just discussed -- the
17 '851 patent, the '501 patent, and the '703 patent, is it your
18 understanding that those are the patents at issue in this case
19 here today?

20 A. It is my understanding that that is the case.

21 Q. You may have addressed this earlier in your testimony, but
22 did ADREA ever provide Barnes & Noble with a copy of these
23 claim illustrations?

24 A. Yes, I believe we did.

25 Q. Were those claim illustrations provided to Barnes & Noble

Ea7radr4

Shamoon - direct

1 as an attachment to Mr. Ambwani's March 29, 2012, email that we
2 just viewed as Joint Exhibit 21?

3 A. I believe it was.

4 Q. Did you ever participate in any in-person discussions with
5 Barnes & Noble regarding the license of the patents in suit?

6 A. I did towards the end of 2012. We had delegated this to
7 Mr. Ambwani for most of 2012.

8 Q. Who was at that meeting?

9 A. At the meeting I attended?

10 Q. Right.

11 A. I was there. I was there with Mr. McDow, who was our chief
12 patent counsel, Mr. Ambwani. From the Barnes & Noble side, Ms.
13 Brannen was there, who at the time was and still is their
14 director of intellectual property. And an attorney from
15 another law firm.

16 Q. Do you recall specifically when that meeting took place?

17 A. I don't, but I think it was August through September 2012.
18 It was in that time frame.

19 Q. Can you briefly, very briefly, explain to the jury what
20 happened during that meeting.

21 A. We had a conversation about ADREA, our vision. We told
22 Barnes & Noble that we were interested in exploring a peaceful
23 settlement, that we would work with them on crafting a deal
24 that was a positive exchange of value for both ADREA and Barnes
25 & Noble. We were told by --

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Shamoon - direct

1 MR. EDERER: Objection, your Honor, as to what they
2 were told.

3 THE COURT: Sustained.

4 Q. Did you ever make a licensing proposal to Barnes & Noble?

5 A. We did make a licensing proposal.

6 Q. Do you recall what that proposal was?

7 A. I believe was sent them a proposal that asked them to pay
8 50 cents per unit that they sold.

9 (Continued on next page)

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EA78ADR5

Shamoon - direct

1 Q. I am going to direct your attention to Joint Exhibit 31 in
2 your binder.

3 MR. CABRAL: Your Honor, with permission, may I
4 approach?

5 THE COURT: Yes. 31 is received.

6 (Joint Exhibit 31 received in evidence)

7 Q. Dr. Shamoon, do you recognize this document?

8 A. Yes. This is what is called a term sheet outlining the
9 proposal we were making to Barnes & Noble.

10 Q. Is this the same proposal you referenced in your previous
11 testimony?

12 A. Yes, it is.

13 Q. I want to direct your attention to the bottom of the page,
14 the bottom third. There is a reference to fees. Do you see
15 that?

16 A. Yes, I do.

17 Q. And that sentence that follows the word fees refers to 50
18 cents. Do you see that?

19 A. Yes.

20 Q. What is your understanding of what that 50 cents referred
21 to?

22 A. That 50 cents refers to a payment per book reader that they
23 sold that would give them a license to the patents that we had.

24 Q. Next to the 50 cents, do you see the word licensed reader?

25 A. Yes.

EA78ADR5

Shamoon - direct

1 Q. When you made this offer to Barnes & Noble, was that offer
2 limited to e-book viewers?

3 A. I am not a lawyer, but one thing I learned is when things
4 are capitalized, you sort of look up for a definition. So if
5 you look up at the bottom of the definition section, it says
6 licensed readers, means Barnes & Noble reader devices and
7 Barnes & Noble reader software. People can read it for
8 themselves, but the idea was that people bought books from the
9 Barnes & Noble bookstore on either a hardware device called the
10 Nook or on an app that ran on an iPhone or an Android phone.
11 And rather than try to charge for the books that were being
12 sold, we just said, Listen, why don't we just say 50 cents per
13 reader, whether it's a device or whether it's an app, and then
14 we won't charge for the books. At least that's what I think
15 this said.

16 Q. So without reference to the document itself, did your offer
17 to Barnes & Noble for licensing include 50 cents per e-book
18 viewer, per app, or for both?

19 A. I think it's for both. If you look at licensed reader, it
20 says reader devices, which I think is the actual Nook device,
21 or reader software, which is an app that runs on somebody
22 else's device, like an iPhone or Android phone.

23 Q. When you made the offer to Barnes & Noble, did you have any
24 idea of the volume of apps that would fall within this offer?

25 A. We had. We were using publicly available information, but

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Shamoon - direct

1 we had different marketing surveys that we could get.

2 Q. Why was your offer not limited to e-book readers
3 themselves?

4 A. By e-book, you mean the actual hardware?

5 Q. Correct.

6 A. Because some people used a Barnes & Noble piece of software
7 to buy books as well. If you had an iPhone, you just get the
8 app from Barnes & Noble and just read the book on your iPhone
9 or iPad. You wouldn't need to buy a second device.

10 Q. Why did you offer 50 cents?

11 A. There's industry standards for these types of patents.

12 MR. EDERER: Objection, your Honor. There is no
13 foundation for what he knows.

14 THE COURT: If the objection is to foundation, see if
15 you can lay a foundation, counsel.

16 Q. Are you aware of any industry standards for licensing of
17 similar technology to what you were offering Barnes & Noble
18 with this Joint Exhibit 31?

19 A. Yes, I am.

20 Q. What is your understanding of those industry standards?

21 THE COURT: Maybe there is a misunderstanding about
22 what is meant by foundation.

23 Without telling us what those standards are, how did
24 you become aware of those standards?

25 Q. You can answer it.

EA78ADR5

Shamoon - direct

1 A. Well, as I said, I have been at Intertrust since 2003. We
2 have been very active in what is called standards-based
3 licensing.

4 MR. EDERER: Objection. That has nothing to do with
5 the e-book industry.

6 THE COURT: I am going to hear a little bit more.

7 When you talk about standards, are you talking about
8 some official standard or just custom and practice?

9 THE WITNESS: Sir, I am talking about both. One of
10 the things about Internet-based devices, in the old days people
11 used to write formal standards and then there would be patent
12 polls that would price the patents associated with those formal
13 standards. Because companies like Google and Apple started to
14 arise in the market and write their own technology, people
15 still conducted licensing but the pricing was done differently
16 because there wasn't an open recipe you can map patents onto.

17 If I can continue --

18 THE COURT: No.

19 So, defense counsel may, if he wish, have a brief voir
20 dire on whether there is a sufficient foundation or not. If
21 not, I will allow the original question to be answered.

22 MR. EDERER: Should I do so from here.

23 VOIR DIRE EXAMINATION

24 BY MR. EDERER:

25 Q. So, Mr. Shamoon, when you're talking about industry

EA78ADR5

Shamoon - direct

1 standards with respect to the licensing of e-reader devices,
2 are you talking about information that you had with respect to
3 prior licensing deals relating to the licensing of e-reader
4 devices or are you talking about something else?

5 A. Maybe I should have used the word industry norms for
6 licensing, but I was talking about what people who make devices
7 pay for component technologies that go into things like
8 e-readers, and a lot of e-readers have audio players and video
9 players and they license that technology as well.

10 THE COURT: That's enough.

11 Now, going back to plaintiff's counsel, given that
12 answer, I think the objection needs to be sustained, unless you
13 have any further questions you want to put to the witness by
14 way of foundation.

15 BY MR. CABRAL:

16 Q. Without a reference to any particular standards or issued
17 norms, are you able to tell the jury how you arrived at that 50
18 cent number?

19 A. It seemed like a fair thing to ask for.

20 Q. Did ADREA ever make an offer to Barnes & Noble to license
21 ADREA's patents for a lump sum number?

22 A. I believe there was a subsequent offer made by Mr. Ambwani
23 to Ms. Brennan for \$15 million.

24 Q. In response to either the \$15 million offer or 50 cent per
25 viewer and app offer, has Barnes & Noble ever offered to pay

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1 ADREA anything for a license of the patents in issue in this
2 case?

3 A. No.

4 Q. We are almost done here.

5 Did you make the decision to file suit against Barnes
6 & Noble?

7 A. Yes, I did.

8 Q. Did you want to sue Barnes & Noble?

9 A. I did not. I don't like to sue people.

10 Q. Can you explain your answer, please?

11 A. I am a technical guy. I invent stuff. I generally believe
12 inventions I am associated with have value. I like to form
13 partnerships. In general, in my experience, I have been able
14 to form partnerships in the majority of the cases involving
15 this type of technology.

16 Q. So why did you ultimately file suit?

17 A. We really felt that they needed a license for these
18 patents, and they were just refusing to take a license. They
19 were refusing to work with us. They literally told us that
20 they had no interest in working with us and rebuffed all of our
21 offers. We had no choice. A lot of money went into creating
22 these inventions, and we have a business to run.

23 MR. CABRAL: I offer the witness.

24 THE COURT: Cross-examination.

25 MR. EDERER: Your Honor, we have a cross-examination

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1 binder with some exhibits. May I approach?

2 Would you like one as well?

3 THE COURT: Just introduce individual exhibits.

4 CROSS-EXAMINATION

5 BY MR. EDERER:

6 Q. Good afternoon, Mr. Shamoon.

7 A. Hello.

8 Q. Now, you testified that ADREA -- is it an ADREA or ADREA?

9 A. I use both. It stands for advanced reading algorithms.

10 Q. You testified that ADREA is a joint venture, correct?

11 A. Yes, sir.

12 Q. That's between Discovery, Philips, Sony and Intertrust, is
13 that right?

14 A. Yes.

15 Q. And the reason ADREA was formed was to help Discovery
16 monetize their electronic book packets, correct?

17 A. Not just Discovery. ADREA was formed to bring together
18 inventions from three major research companies.

19 Q. When you were originally approached, you mentioned you were
20 approached by Mr. Rosenstock of Discovery back in the summer of
21 2009, is that correct?

22 A. Yes, that's what I said.

23 Q. Did you understand at the time that Discovery was looking
24 to monetize e-reader patents that it had previously been unable
25 to license?

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1 A. I think they were trying to build a business around the
2 patents. Monetizing to me means make money, so I guess they
3 were trying to make some money for these patents.

4 Q. Were you aware at the time of whether Discovery had ever
5 succeeded in obtaining patent licenses for any of its e-reader
6 or e-book patents?

7 A. I was not aware that they had.

8 Q. You had no idea about that?

9 A. No.

10 Q. Whether they were successful or unsuccessful in monetizing
11 or licensing their patents in the e-reader space?

12 A. When Jay Rosenstock called me, I didn't.

13 Q. Do you recall testifying in a deposition in this case,
14 Mr. Shamoon?

15 A. Yes.

16 THE COURT: Counsel, just so you know my procedure as
17 to depositions, you will first read the page and line numbers
18 that you want to put before the jury, and then pause for a few
19 seconds in case there is any objection. If there is no
20 objection, then you can go ahead and read the relevant
21 deposition portion. If there is an objection, I will rule on
22 it at that time.

23 MR. EDERER: May I approach the witness with a copy of
24 the transcript?

25 THE COURT: If you need to. It's not necessary for

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1 him to see it if you don't want to.

2 Q. I am reading, Mr. Shamoon, page 47 of Mr. Shamoon's
3 deposition, which took place on October 22, 2013, line 8
4 through line 11. That's the question.

5 THE COURT: Any objection?

6 MR. CABRAL: No objection, your Honor.

7 THE COURT: Go ahead.

8 "Q. Well, you had -- so as you sit here today, you have never
9 been told one way or the other whether Discovery had ever
10 succeeded in obtaining patent licenses for any of John's
11 patents?"

12 MR. EDERER: That was the question.

13 The answer is from line 15 to 17.

14 MR. CABRAL: Then I would object because the answer
15 goes on for some time.

16 THE COURT: Gentlemen, the question is irrelevant
17 without the answer. I assumed it was the answer that was being
18 offered.

19 Let me see a copy of the deposition.

20 MR. CABRAL: To be clear, I would just ask that the
21 full answer be read.

22 THE COURT: Let me see a copy of the deposition.

23 Page?

24 MR. EDERER: Page 47. The answer starts on line 15.

25 THE COURT: So counsel may read lines 15 through 17.

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1 Under the rule of completeness, the rest does not have to be
2 read now. Of course, it can be inquired into on redirect, but
3 it's not going to be read now.

4 MR. CABRAL: Thank you, your Honor.

5 THE COURT: Just to move this along, do you remember
6 giving a deposition?

7 THE WITNESS: Yes, sir, I do.

8 THE COURT: And you understand -- and this is really
9 just for the jury's benefit -- that a deposition is where the
10 lawyers in a lawsuit, before the case goes to trial, can take
11 the testimony of various witnesses so that they can prepare for
12 trial. You understand that, yes?

13 THE WITNESS: Yes, I do, of course.

14 THE COURT: The witnesses, and in this case you, were
15 under oath, correct?

16 THE WITNESS: Yes, sir.

17 THE COURT: You were asked the question:
18 "Q. So as you sit here today, you have never been told one way
19 or the other whether Discovery had ever succeeded in obtaining
20 patent licenses for any of John's patents?"

21 And you answered:

22 "A. I know from like the venture formation, the due diligence,
23 that John's patents have not been licensed to anyone."

24 So that was your initial answer, correct?

25 THE WITNESS: Yes, sir.

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1 THE COURT: So, ladies and gentlemen, just so you
2 understand about depositions, this is testimony, as you just
3 heard, that's given before a case goes to trial. There is no
4 judge present. It's taken in the lawyers' offices, but the
5 witnesses are under oath, and therefore obliged to tell the
6 truth.

7 If a witness here in court gives an answer that is
8 arguably different from an answer that he or she gave at the
9 deposition, then counsel can raise that different answer with
10 you, as we just did. And then you have to decide whether it
11 really is different or not. If it's not different, it doesn't
12 matter. If it is inconsistent, as we say, then you have to
13 decide whether that is important or unimportant, and you can
14 assess the whole thing as you see fit, and you can decide
15 either that the original testimony was the more accurate
16 testimony, or the later testimony was the more accurate, or any
17 other possibility, just like evidence given here in court, and
18 you may consider it as such when it's read into evidence, as it
19 was here.

20 I note purely as a technical matter, and not for the
21 jury's concern, it would also be admissible as an admission by
22 a party adversary.

23 Go ahead, counsel.

24 BY MR. EDERER:

25 Q. Just to be clear, Mr. Shamoon, the reference to John and

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1 John's patents in that question and answer that was just read
2 was to Mr. Hendricks, correct?

3 A. Yes.

4 Q. And two of Mr. Hendricks' patents are involved in this
5 case, correct?

6 A. Yes.

7 Q. So up through 2009, summer of 2009, as far as you knew,
8 Discovery had never made any money licensing John's e-reader
9 patents, is that right?

10 A. Could you tell me the date again, please?

11 Q. You testified earlier that the initial discussions that you
12 had regarding this venture were in the summer of 2009 I
13 believe?

14 A. Yes.

15 Q. So as of that date, was it your understanding that
16 Discovery had never made any money licensing its e-reader
17 patents?

18 A. If I could just clarify, based on having my deposition
19 testimony, I think I said during the venture formation and due
20 diligence, which came after when Jay Rosenstock called me
21 initially. When Jay called me in the summer of 2009, the only
22 thing I knew about was that Discovery had sued Amazon with
23 those patents because that was in the newspaper.

24 Q. Let's talk about through the formation of ADREA. You said
25 that occurred in the summer of 2010, correct?

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1 A. The actual formation occurred in 2010. It look a long time
2 to get everybody together, negotiate these agreements, do our
3 homework of where the patents came from, the quality of the
4 inventions, find different partners who wanted to be involved,
5 figure out how much it would cost, figure out whether we had
6 the time and resources to do a good job running it, at least
7 come up with an initial business plan for the company and so
8 on. These things take a long time. It feels like yesterday,
9 but 2009 is a long time ago.

10 MR. EDERER: Move to strike the response. The
11 question was: Was ADREA formed in 2010, I believe, or
12 something along those lines?

13 THE COURT: I am not going to strike it, but I do want
14 to caution the witness. Particularly when you're on
15 cross-examination, you need to confine your answers quite
16 narrowly to just answering the question put. Your counsel,
17 when he gets up on redirect, can ask any follow-up questions
18 that are permissible at that time. But I will leave it as is.

19 Put another question.

20 THE WITNESS: Sorry.

21 BY MR. EDERER:

22 Q. So was it your understanding in 2009, when you were first
23 approached by Mr. Rosenstock, that Sony and Discovery were
24 having some discussions about licensing of John's patents?

25 A. In the summer of 2009, when Mr. Rosenstock called me, I

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1 knew they were in court with Amazon. Mr. Rosenstock had worked
2 at Sony. He may have talked to me, may not have, but it was
3 not an element of focus in that conversation.

4 Q. So the answer to my question is, no, you did not understand
5 that Sony and Discovery were having discussions about possible
6 licensing of John's patents in 2009?

7 A. I knew that Sony and Discovery talked about things, but I
8 wasn't very clear on the details. They may have talked about
9 this. I wasn't really that focused on it.

10 Q. Isn't it true, sir, that Sony suggested to Discovery that
11 you and your company become involved in a potential joint
12 venture as a monetization partner?

13 A. That came after the conversations I had with Mr. Rosenstock
14 in summer of 2009.

15 Q. So the answer to my question is, yes, sometime later on in
16 2009 you understood that Sony had suggested to Discovery that
17 your company become involved as a monetization partner to
18 attempt to monetize John's patents?

19 A. I am hazy on whether Sony suggested it or whether I called
20 Sony and said, why don't we work with Discovery, and with what
21 you guys have done in e-reader space, to see if there are other
22 people who want to join. But eventually Sony thought it was a
23 good idea, and they must have endorsed it.

24 Q. Why don't you take a look at tab 4 in the book that I just
25 gave you, which is Defendants' Exhibit 50.

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1 MR. EDERER: Your Honor, should I bring up the paper
2 copy of the exhibit?

3 THE COURT: Yes.

4 Q. So, Mr. Shamoon, do you have Defendants' Exhibit 50 in
5 front of you?

6 A. Yes, I do.

7 Q. This is an e-mail chain that starts, if you look at the
8 bottom of page 2.

9 A. You're talking about the e-mail from Jay Rosenstock?

10 Q. It's an e-mail from Jay Rosenstock to a Mr. Mitomo. Do you
11 know who Mr. Mitomo is?

12 A. He is the head of patent licensing standards at Sony. He
13 is also a board member of Intertrust.

14 Q. That was on November 30, 2009, right?

15 A. That's the time stamp on the e-mail.

16 Q. If you look at the bottom of page 2, Mr. Rosenstock writes
17 to Tosh --

18 THE COURT: No. A joint exhibit is automatically in
19 evidence, but not an individual party's exhibit. Do you want
20 to offer this exhibit?

21 MR. EDERER: I do want to offer it.

22 THE COURT: Any objection?

23 MR. CABRAL: I object on relevancy grounds.

24 THE COURT: Let me take a look.

25 No. I think it is arguably relevant sufficient to

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1 pass the very minimal test of Rule 401. It's received.

2 (Defendant's Exhibit 50 received in evidence)

3 Q. So focusing on that e-mail that begins at the bottom of
4 page 2, Mr. Shamoon, you are not copied on that e-mail,
5 correct?

6 A. Tosh and I both sign our e-mails with the first letter of
7 our first name. So I am not copied on the original e-mail, but
8 as the thread evolves I get added.

9 Q. So, in fact, on that same day, if you look on page 1 of
10 this e-mail, on that same day, the thread was forwarded to you,
11 correct?

12 A. Yes.

13 Q. If you look at that original e-mail, it's an e-mail from
14 Mr. Rosenstock to Mr. Mitomo of Sony and a Mark Khalil,
15 correct?

16 A. Yes.

17 Q. He is also with Sony?

18 A. Yes.

19 Q. Mr. Rosenstock says to Mr. Mitomo and Mr. Khalil: "After
20 further discussion with Discovery management, in the spirit of
21 getting our JV established on the right footing with commonly
22 aligned objectives, we are prepared to move on the Sony license
23 fee issue." Do you see that?

24 A. Yes.

25 Q. Was that an indication to you or did you understand from

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1 that that there were licensing discussions going on between
2 Sony and Discovery at that point in time?

3 MR. CABRAL: Objection. Dr. Shamoon is not copied on
4 this e-mail.

5 THE COURT: Sustained.

6 MR. EDERER: As I pointed out, that e-mail was
7 forwarded to Mr. Shamoon on the same day.

8 THE COURT: I don't know that his understanding would
9 be relevant. It's really whether he had an understanding or
10 not. The e-mail will either stand on its own or not, which is
11 in evidence. Sustained.

12 Q. Shortly after this time period, November 2009, Mr. Shamoon,
13 you wrote to Mr. Rosenstock and told him that you were excited
14 about the opportunity to help monetize these patents, correct?

15 A. I don't see any e-mail, but it sounds like something I
16 would have said.

17 Q. Why don't you take a look at tab 5, which is Defendants'
18 Exhibit 286. The top e-mail is an e-mail from you to Mr.
19 Rosenstock, dated December 25, 2009. Do you see that?

20 A. Yes. Christmas Day.

21 MR. EDERER: I offer Defendants' Exhibit 286.

22 THE COURT: Any objection?

23 MR. CABRAL: Again, we object on relevancy grounds.

24 THE COURT: Overruled. Received.

25 (Defendant's Exhibit 286 received in evidence)

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1 Q. So, Mr. Shamoon, just looking at the top e-mail of Exhibit
2 286, you were writing to Mr. Rosenstock on Christmas Day 2009,
3 correct?

4 A. Yes.

5 Q. In the third paragraph you say, "I am also quite excited by
6 this project. A bunch of us have been waiting for years to
7 monetize the e-book area and this venture is an excellent
8 launch pad and vehicle for doing so." Do you see that?

9 A. Yes, that's what I wrote.

10 Q. By monetize, you meant the act of making money by creating
11 a business in the e-book area, correct?

12 A. Yes. I meant creating a business in the e-book area.

13 Q. You meant the act of making money by creating a business in
14 the e-book area, correct?

15 A. I meant we wanted to create a venture, which is a business,
16 to help make money in the e-book area.

17 Q. And this business of monetizing patents in the e-book
18 industry had never been done before by anybody to your
19 knowledge, correct?

20 A. Making money in the e-book industry?

21 Q. By licensing patents relating to e-books and e-readers.

22 A. Patents were an important part of this business but, you
23 know, as we have discussed, I don't think anything here can be
24 taken to mean just by licensing patents.

25 Q. Well, it says here, "A bunch of us have been waiting for

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1 years to monetize the e-book area," correct?

2 A. Right.

3 Q. So did you know of anybody who prior to that time, December
4 25, 2009, had successfully monetized the e-book area?

5 A. A lot of people monetized the e-book area by that time. I
6 wrote the e-mail, and I will tell you what I meant. What I
7 meant was we saw an opportunity here and wanted to create a
8 business to make money from it.

9 Q. At one point after that Philips was introduced as a
10 potential partner, I believe you testified, correct?

11 A. Correct.

12 Q. So you were going to try to monetize their e-reader and
13 e-book patents as well?

14 A. We invited them to join the business as a partner by a
15 share in the company. They did the same thing as you heard
16 earlier. They bought their share in the company by
17 contributing to some patents. Patents are basically legal
18 documents that define an invention, and we were going to use
19 those as starters to start a business to make money in the
20 e-book space.

21 Q. Isn't it true, sir, that the purpose of the joint venture
22 was to monetize the e-reader and e-book patents that were being
23 contributed by these various companies, is that true?

24 A. Patents were a very important part of this business. I
25 don't want to hang on the meaning of the word monetize, but a

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1 person monetizes patents and technology in all sorts of
2 different ways. I don't think anyone said that they would
3 exclusively just license patents out of this business. We had
4 different ideas we were going to experiment with. But as you
5 know, and as everybody here knows, the business was formed by
6 taking patents and putting them in there, putting some money
7 in, bringing some people in who knew how to build businesses on
8 top of inventions, in a market that was just beginning to
9 evolve in this time period.

10 Q. Can you take a look at tab 47 in your binder, please? It's
11 the last exhibit in the binder. Sorry about that.

12 A. No problem.

13 Q. Do you have that?

14 A. Yes, sir, I do.

15 Q. This document is headed, "Proposed JV terms, subject to tax
16 and accounting review," is that right?

17 A. Yes.

18 Q. Is this document a proposal or a term sheet that was put
19 together by ADREA in connection with the establishment of the
20 ADREA joint venture?

21 A. I don't actually remember who put this document together.

22 Well, it's in advance of the formation of ADREA. And
23 it doesn't have Philips on it. If you look at the ownership
24 section, it says Discovery 33, Sony 33, Intertrust 33. As I
25 said, I don't know who put this together, whether it was people

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1 from Intertrust or people from Sony or people from a law firm
2 for Discovery. Do you know?

3 Q. I am asking you, sir, if you know.

4 A. I said I don't know who wrote this document. It's
5 definitely a document that was circulated at the time. As I
6 said --

7 MR. CABRAL: Objection. Lack of foundation.

8 MR. EDERER: May I ask this question, your Honor?

9 Q. Is this document a document that was prepared by at least
10 one of the proposed joint venturers -- Discovery, Sony and
11 Intertrust -- prior to the time that the joint venture was
12 formed?

13 MR. CABRAL: Objection. Calls for speculation.

14 Q. Or one of their representatives?

15 THE COURT: Sustained.

16 Q. Mr. Shamoon, this document didn't just appear on your desk.
17 This document related to the discussions you were having about
18 forming a joint venture, correct?

19 MR. CABRAL: Objection.

20 THE COURT: Forgetting about the first sentence of
21 that question, the second sentence is permissible.

22 So you may answer the question.

23 A. Could you ask it again, please?

24 Q. The question was, was it your understanding that this
25 document was prepared by one of the prospective joint venturers

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1 listed on the document: Discovery, Sony or Intertrust?

2 A. It would appear to have been prepared by someone. It
3 doesn't look like a document Intertrust wrote, but it may have
4 been. Or it may have been prepared by one of the attorneys
5 working for one of the three companies.

6 MR. CABRAL: Objection. Asked and answered. It was
7 the same question he previously asked.

8 MR. EDERER: I would like to offer this document in
9 evidence.

10 THE COURT: Let me see the document.

11 Let me ask the witness. Did you receive this
12 document?

13 THE WITNESS: Sir, I honestly don't remember whether
14 it was e-mailed to me or sent to me or whether it was presented
15 in one of these round-table meetings we had.

16 THE COURT: I don't care how it got to you. Do you
17 remember whether or not you received this document? Yes or no
18 or I don't recall.

19 THE WITNESS: I don't recall. I'm sorry.

20 THE COURT: The objection is sustained.

21 MR. EDERER: I point out that this was a document that
22 was produced by ADREA in this litigation.

23 THE COURT: I don't care if it was produced by the man
24 in the moon in this litigation. I am dealing with the
25 objection to the admissibility of this document with this

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1 witness, and the foundation for the admissibility of it in this
2 case regarding the question of this witness has not been
3 established. Sustained.

4 BY MR. EDERER:

5 Q. You mentioned earlier, Mr. Shamoon, it took a while to get
6 the joint venture formed, correct?

7 A. Yes, sir.

8 Q. Discussions were initially had in the fall and then into
9 the winter of 2009, correct?

10 A. Yes, sir.

11 Q. And the venture was not formed until the summer of 2010,
12 correct?

13 A. Yes. By the way, the discussions continued through the
14 winter and spring of 2010, as I recall.

15 THE COURT: That may be, but I need to tell the
16 witness once again. You're not here to tell us the history of
17 the world. You're here right now to answer questions of
18 counsel and only questions of counsel. So don't add things,
19 don't volunteer things. Just answer the questions.

20 Understood?

21 THE WITNESS: Yes, sir.

22 THE COURT: Good.

23 Q. By June 2010, the parties had still not formed a joint
24 venture, correct?

25 A. By June.

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1 Q. By June of 2010.

2 A. That sounds right.

3 Q. Did there come a point in time where you understood that
4 Discovery felt as though the potential joint venturers were
5 dragging their feet in the negotiations?

6 MR. CABRAL: Objection. It calls for speculation.

7 THE COURT: How does that call for speculation? He
8 was asking for his understanding.

9 Overruled.

10 A. This was a complicated negotiation where people got
11 frustrated at different times.

12 Q. Can I direct your attention to tab number 7 in your book,
13 please?

14 Do you recognize tab number 7, which is Defense
15 Exhibit 282?

16 A. Right.

17 THE COURT: You want to provide the Court with a copy?

18 MR. EDERER: Yes.

19 THE COURT: Go ahead.

20 Q. Do you recognize Defense Exhibit 282, Mr. Shamoon?

21 A. Yes.

22 MR. EDERER: I offer 282 into evidence, your Honor.

23 MR. CABRAL: No objection, your Honor.

24 THE COURT: Received.

25 (Defendants' Exhibit 282 received in evidence)

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1 Q. I would also like you to take a look at tab number 6,
2 Mr. Shamoon.

3 So tab number 6 is Defense Exhibit 650. Do you see
4 that exhibit?

5 A. Yes.

6 Q. Do you recall receiving a copy of that document?

7 A. Yes.

8 MR. EDERER: I move the admission of Defense Exhibit
9 650.

10 MR. CABRAL: No objection.

11 THE COURT: Received.

12 (Defendant's Exhibit 650 received in evidence)

13 Q. Starting with that document, Exhibit 650, the lower e-mail
14 is an e-mail from Mr. Rosenstock of Discovery to Mr. Mitomo of
15 Sony, correct?

16 A. Yes.

17 Q. Mr. Rosenstock is indicating, among other things, that his
18 management, Discovery management is highly frustrated with the
19 pace of the negotiations with the parties. They were
20 originally hoping to have a deal by the end of 2009, correct?

21 A. Yes. That's what it says.

22 Q. That e-mail was forwarded to you by Mr. Rosenstock, JFYI,
23 meaning just for your information, right?

24 A. Yes.

25 Q. Then if you look at tab 7 which is Defense Exhibit 282, the

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1 lower e-mail is an e-mail from Mr. Rosenstock to Mr. Mitomo on
2 June 22, 2010, about three months later, right?

3 A. Yes.

4 Q. He says to Mr. Mitomo, this market is really going to take
5 off, right?

6 A. Yes.

7 Q. Mr. Mitomo responds, "then sign the agreement and let Talal
8 fix your problem before it becomes a real problem, do you see
9 that?

10 A. Yes.

11 Q. Mr. Mitomo forwarded that e-mail to you and you responded
12 with a smiley face, right?

13 A. Yes.

14 Q. Did you understand that the problem that Mr. Mitomo was
15 suggesting to Mr. Rosenstock that you fix was the inability of
16 Discovery to monetize its patents for many years?

17 A. I don't think so. With the understanding that everybody on
18 this e-mail thread are old friends, I think this is just a way
19 of people trying to push each other to move faster on getting a
20 deal done.

21 Q. So this is just Mr. Mitomo's way of saying hurry up?

22 A. Yeah.

23 Q. It had nothing to do with you fixing a monetization
24 problem, right?

25 A. Mr. Mitomo is a second language speaker of English. He is

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1 a Japanese person and he uses English in an odd way. You got
2 to know him to really hear this but, again, you see this in the
3 earlier email. People were getting frustrated about how long
4 things were taking and then they are just baiting each other,
5 the way friends do.

6 Q. You testified earlier on direct examination that these
7 companies then all agreed to contribute various e-book and
8 e-reader related patents to the venture, correct?

9 A. Yes, sir.

10 Q. ADREA was formed, I think you said, on August 25, 2010,
11 that was the formation document that we looked at?

12 A. That sounds correct.

13 Q. Before that date these patents were separately owned,
14 correct?

15 A. Yes, sir.

16 Q. So two of the patents that are involved in this case, the
17 '851 patent and '501 patent were owned by Discovery, right?

18 A. Yes, sir.

19 Q. The '703 patent was owned by Philips, correct?

20 A. I think so.

21 Q. It wasn't until after ADREA was formed that any of those
22 patents were transferred or assigned to ADREA, correct?

23 A. Yes.

24 Q. Now, when you entered into the joint venture, you believed
25 the joint venture had the potential to generate revenue from

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Shamoon - cross

1 licensing of these patents, correct?

2 A. That was one of the business models, yes.

3 Q. Since that time, how many licenses has ADREA signed up
4 outside of its litigation with Amazon?

5 A. We have signed a deal with Amazon -- I'm sorry, just with
6 Amazon.

7 Q. My question was, how many licenses has ADREA signed up
8 outside of its litigation with Amazon?

9 A. None.

10 Q. How much revenue has ADREA realized outside of whatever
11 revenue it may have realized from the Amazon settlement
12 agreement?

13 A. None.

14 Q. Were you expecting that within four years you would have
15 zero licenses in place outside of the one license you entered
16 into when you settled a lawsuit?

17 A. It's a difficult question because the e-book market when we
18 formed the venture we started talking about it, it s really in
19 the early stages and I had been doing licensing for a long
20 time. Sometimes this stuff goes fast, sometimes it doesn't.
21 So I guess in hindsight I am not surprised, but you always go
22 into these things with optimistic expectations.

23 Q. Well, it wasn't for lack of trying, was it? You did try to
24 get other companies interested in taking a license to some of
25 these patents, didn't you?

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Shamoon - cross

1 A. We tried and we tried and we tried. It's very hard to
2 license patents.

3 Q. By the way, you testified earlier about yourself and Mr.
4 Ambwani providing services to ADREA as part of your duties with
5 Intertrust, correct?

6 A. Yes.

7 Q. You are not an employee of ADREA, are you?

8 A. Well, that's not all that I do but I provide services.
9 ADREA pays me to provide services to it.

10 Q. Does ADREA pay you as an employee to provide services to
11 it?

12 A. ADREA pays a consulting fee to Intertrust to provide skills
13 and services to the company.

14 Q. In fact ADREA has no employees at all, does it?

15 A. It doesn't employ anyone full time.

16 Q. Isn't it true that you only spent about five or ten percent
17 of your time on ADREA business following its formation?

18 A. Yeah.

19 Q. Your main focus was to run Intertrust as CEO, correct?

20 A. I am also on the board of several ventures which I guess is
21 part of running Intertrust, the same way this is a venture that
22 Intertrust owns a piece of. I attend board meetings of other
23 companies and then I manage people at Intertrust.

24 Q. But between ADREA and Intertrust, you spend a lot more time
25 on Intertrust business than you do on ADREA business, correct?

EA78ADR5

Shamoon - cross

1 A. One of the reasons I am having a hard time answering these
2 questions is, the time I spend at ADREA is part of my job at
3 Intertrust as well.

4 Q. Let me ask the question a little differently. In your
5 duties as Intertrust CEO as between the time you spend on
6 Intertrust business that does not involve ADREA and the time
7 you spend on Intertrust business that does involve ADREA, you
8 spend a lot more time on Intertrust business that does not
9 involve ADREA correct?

10 A. Yes, of course.

11 Q. Now, you testified that one of the first things you did
12 after ADREA was formed was that you made efforts to try to
13 settle the Amazon lawsuit, correct?

14 A. Yes.

15 Q. You testified also that the lawsuit was settled for, I
16 think you said, \$10 million with respect to the Discovery
17 patents, correct?

18 A. Yes.

19 Q. And an option at \$2.5 million to license the Discovery
20 and -- I'm sorry -- the Philips and Sony patents, correct?

21 A. Yes. They exercised that.

22 Q. Wasn't it also the case that for the entire option period
23 from the time that the Amazon settlement agreement was entered
24 into until the option period ended which was, I believe, a two-
25 or a two-and-a-half-year option period for Amazon to decide

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Shamoon - cross

1 whether or not it wanted to take a license to the Sony and
2 Philips patents, correct? Is that about two and a half years?

3 A. Something like that, yeah.

4 Q. For that period of time, didn't the agreement also provide
5 that ADREA would not sue Amazon over any of those patents?

6 A. I don't remember that term.

7 Q. Let's take a look again at Joint Exhibit 32 which I believe
8 is in your binder also, although you may have it from your
9 direct examination.

10 A. It's in the binder you gave me?

11 Q. Yes.

12 A. 32?

13 Q. No. It's Joint Exhibit 32 but tab number 17.

14 A. So 17 in your book?

15 Q. Yes.

16 A. OK.

17 Q. If you look at paragraph 6.4 on page 7?

18 A. I am just waiting for it to come up on the screen.

19 Q. So you see it now, right?

20 A. Right.

21 Q. So this paragraph provides that during the period in which
22 Amazon had the right to take a license for the Sony and Philips
23 patents that ADREA would not sue Sony or Philips -- I'm
24 sorry -- would not sue Amazon for infringing the Sony and
25 Philips patents, correct?

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Shamoon - cross

1 A. That's what it looks like.

2 Q. It's called a covenant not to sue, you have heard that
3 term?

4 A. Yes.

5 Q. Back in 2010 when you first got involved in discussions
6 relating to the settlement of the Amazon case, ADREA had
7 actually asked Amazon for up to \$50 million to settle that
8 case, right?

9 A. There was some back and forth.

10 MR. CABRAL: Objection, your Honor.

11 THE COURT: Sustained.

12 Q. Let me point you to a document, tab 9 in your book, which
13 is Defense Exhibit 69.

14 MR. CABRAL: Your Honor, I object on relevancy grounds
15 and hearsay -- I apologize -- Rule 408 as well.

16 THE COURT: That's the right one.

17 MR. CABRAL: Thank you. Third time is the charm.

18 THE COURT: Sustained.

19 Q. Do you recall any discussions, Mr. Shamoon, about dollar
20 figures that ADREA was seeking in settlement of the Amazon
21 agreement?

22 MR. CABRAL: Same objection.

23 THE COURT: Sustained.

24 Q. Now, the plan after settling the Amazon litigation was to
25 get a licensing program started, correct?

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Shamoon - cross

1 A. There were several plans. When I hear the word "licensing
2 program," it could mean many different things. I don't want to
3 tell you what you mean.

4 Q. Why don't I refer you to a document. Do you recall sending
5 an e-mail to Mr. Hendricks at or about the time that you
6 settled the Amazon agreement?

7 A. I sent Mr. Hendricks a bunch of e-mails over the time
8 that --

9 Q. Yes. Take a look at tab 18 in your binder.

10 A. Got it.

11 Q. We are talking about Defense Exhibit 115.

12 Do you have that document, Mr. Shamoon?

13 A. Yes, sir, I do.

14 Q. Do you recognize the lower e-mail on the first page of tab
15 18?

16 A. "Dear John, I am writing to wish you all the best"?

17 Q. Yes.

18 A. Yes.

19 Q. That was an e-mail that you sent to Mr. Hendricks on
20 December 23, 2011, two days before Christmas?

21 A. Yes.

22 MR. EDERER: I move the admission of Defense Exhibit
23 115, your Honor.

24 MR. CABRAL: No objection.

25 THE COURT: Received.

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Shamoon - cross

1 (Defendant's Exhibit 115 received in evidence)

2 Q. So in this e-mail that you wrote to Mr. Hendricks on
3 December 23, 2011, you talk about the fact that the Amazon
4 agreement has now been signed, correct?

5 A. Yes.

6 Q. And then you go on to say: "2012 brings new goals for
7 ADREA. We are looking forward to continuing the charge on
8 patent licensing. Barnes & Noble, Apple and Google are obvious
9 next targets." Do you see that?

10 A. It's before I learned to spell "Barnes & Noble."

11 Q. Then if you drop down another paragraph it says: "We would
12 not be where we are today without your valuable portfolio. The
13 win against Amazon is a starting point for what we hope is a
14 healthy and accretive licensing program." Do you see that?

15 A. Yes.

16 Q. So that was one of your one objectives at or about that
17 time, was it not, to establish a healthy and accretive
18 licensing program, correct?

19 A. Yes. But there were different ways we were looking into
20 doing that. You can license patents by licensing software.
21 You can license patents directly, depending on who you're
22 talking to and what the products of the company are and who you
23 are partnering with.

24 Q. Was it or was it not your objective at or about that time
25 to establish a healthy and accretive licensing program?

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Shamoon - cross

1 MR. CABRAL: Objection, your Honor. Asked and
2 answered.

3 MR. EDERER: I don't think I got an answer to that
4 question, your Honor.

5 THE COURT: No, I think you did. The answer is yes.
6 He then added some stuff, but he said yes.

7 Sustained. Asked and answered.

8 Q. I think you testified earlier that one of the reasons why
9 you wanted to settle the Amazon agreement is because a lot of
10 lawyers' fees were being incurred, correct?

11 A. That was one of the reasons but the other reason was we
12 didn't like being in court.

13 Q. Do you recall discussing with anyone from Discovery the
14 reason why you wanted to settle the Amazon litigation in order
15 to avoid paying additional lawyers' fees?

16 A. That's one of the reasons we don't like being in court. We
17 also don't like being in court because we see it as a
18 distraction from building the business.

19 Q. Let me ask you this. It's now 2014 and you knew back in
20 2012 that Barnes & Noble was not interested in taking a
21 license, correct?

22 A. I'm sorry. Could you ask me the question again?

23 Q. Isn't it a fact that you knew back in 2012 that Barnes &
24 Noble was not interested in licensing any of the patents that
25 we are talking about?

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Shamoon - cross

1 A. Well, just generally people say no until they take a
2 license, so just because somebody says no several times, it
3 doesn't mean you can't think of something really creative or
4 maybe they change their mind or maybe they don't want to go to
5 court, so it's part of the process.

6 Q. Was there anything that prevented you, sir, at any point in
7 time after you sent that e-mail to Mr. Hendricks in late 2011
8 in which you said something about establishing a healthy and
9 accretive licensing program, was there anything that prevented
10 you from licensing these patents to other people besides Barnes
11 & Noble?

12 A. No.

13 Q. That e-mail suggested that obvious targets were Apple and
14 Google, in addition to Barnes & Noble, correct?

15 A. Yes.

16 Q. Have you licensed the patents to Apple and Google?

17 A. No, we haven't.

18 Q. Have you talked to Apple and Google?

19 A. Not about this.

20 Q. Not about what?

21 A. Not about licensing these patents.

22 Q. They were obvious targets back at the end of 2011. It's
23 now getting towards the end of 2014. Are you saying you didn't
24 contact any of those obvious targets in the last three years?

25 A. Well, we ranked the different people in the field. Amazon

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Shamoon - cross

1 was the biggest player. We licensed Amazon. Barnes & Noble
2 was doing a very good job. They were the second, in my
3 opinion, most important player in the market. We were just
4 going down the list. As you know, we spoke to Kobo. I think
5 at the time they were still owned by a Canadian group, it was
6 before the Japanese had bought them, before they had really
7 moved into the American market.

8 I don't want to give my opinions about Apple and
9 Google and the market based on what was discussed earlier,
10 unless people want to hear it, but it was a question of
11 priorities.

12 Q. So the fact of the matter is that at no time since the end
13 of 2011 has anyone on behalf of ADREA made contact with anyone
14 from Apple and Google about getting involved in licensing any
15 of the patents in your portfolio?

16 A. Not that I am aware of.

17 Q. What did you mean when you said that Apple and Google were
18 obvious targets back in late 2011?

19 A. They had bookstores for the iPad and this thing called
20 Google Play, which is the app store, or whatever it's called.
21 I don't know what it is.

22 Q. Isn't it a fact, sir, that you also attempted to engage in
23 licensing deals with respect to one or more of these patents in
24 your portfolio with Samsung?

25 A. We approached Samsung to see if they wanted to become a

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Shamoon - cross

1 shareholder in the company. There was a discussion that went
2 back and forth but we didn't approach them just to take our
3 license.

4 Q. How did that work out?

5 A. They looked at the patents. They asked us a bunch of
6 questions. They thought about it and they decided they had
7 other priorities and didn't buy a share in the company.

8 Q. If you take a look at tab 20 in your book, Defense Exhibit
9 82?

10 THE COURT: Counsel, keep in mind that we are going to
11 let the jury go in about three minutes.

12 MR. EDERER: I will just ask a few questions about
13 this document.

14 THE COURT: All right.

15 Q. So this is Defense Exhibit 82. Do you recognize Defense
16 Exhibit 82, Mr. Shamoon?

17 A. 82 is the one entitled "ADREA Responds to Samsung's
18 Questions"?

19 Q. Correct.

20 A. Yes, I do.

21 MR. CABRAL: Objection on relevancy grounds.

22 THE COURT: I can't tell yet. It hasn't yet been
23 offered. He is about to put a question.

24 Q. Did you prepare this document, Mr. Shamoon?

25 A. This document was prepared by several people. I made input

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Shamoon - cross

1 into it.

2 Q. Did you review it before it was sent to Samsung?

3 A. Yes, I did.

4 Q. In fact you sent it to Samsung, did you not?

5 A. I guess I did. That would make sense for me to do it. It
6 was either me or Mr. Ambwani.

7 Q. If you look at tab 19, Defense Exhibit 81, tab 19 is your
8 e-mail to a gentleman named Pilsu, P-I-L-S-U, of Samsung on
9 November 8, 2011, correct?

10 A. Yeah. I'm not sure Mr. or Ms. Wu is a gentleman, but yes,
11 I sent this e-mail.

12 Q. Attached to this e-mail was Defense Exhibit 82?

13 A. So I sent it.

14 MR. EDERER: So I move the admission of 81 and 82,
15 your Honor.

16 MR. CABRAL: Objection on relevancy.

17 THE COURT: Pardon?

18 MR. CABRAL: Objection on 402, 403. Relevancy.

19 THE COURT: You mean 401 and 403 but, in any event, I
20 think we should discuss that. I am going to let the jury go
21 and we will take it up outside of their hearing.

22 So, ladies and gentlemen, we made good progress in our
23 first day but as they sometimes say, past results are no
24 guarantee of future performance so we need to make sure that we
25 get going early tomorrow. It will be our one really full day

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Shamoon - cross

1 this week because we won't be sitting on Thursday and Friday.
2 So please be in the jury room a couple of minutes before 9:00
3 and we will start at 9:00. Have a very good evening and we
4 will see you tomorrow.

5 (Jury exits courtroom)

6 THE COURT: You can leave your notebooks in the jury
7 room. Don't leave them here in open court and don't take them
8 home with you.

9 (Jury exits courtroom)

10 (Continued on next page)

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(Jury not present)

THE COURT: What is the relevance of Exhibit 82?

MR. EDERER: Your Honor, this has to do with an attempt on ADREA's part --

THE COURT: Maybe we should let the witness go so we can discuss it outside his presence.

We will see you tomorrow at 9 o'clock.

MR. BAUER: Before he leaves, what is your ruling in terms of who he can talk to this evening?

THE COURT: Yes. I'm sorry. While the witness is on cross-examination, you cannot have any contact with your counsel, plaintiff's counsel. Tonight you will be forced not to talk to lawyers. I know it is a hardship, but bear with it as best you can.

MR. BAUER: But with other companies it is OK?

THE COURT: He really shouldn't be discussing his examination at all, but specifically not with lawyers. Basically, my understanding there are a lot of good baseball games on tonight. Just forget about this case.

(Witness not present)

MR. EDERER: Two things at least, your Honor. One is I believe this goes directly to the issue of damages in the hypothetical negotiation.

THE COURT: I think that is the only grounds most of the stuff is coming in on, relating to damages, the fact that

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1 they didn't have licenses with anyone else, and so forth. I am
2 concerned about how widely that door should be opened. I was
3 surprised you didn't stop your cross-examination about a half
4 hour ago, when you asked him did you have licenses with anyone
5 else, answer no, did you get income from anyone else, answer
6 no. That's what the jury presumably needs to know for your
7 purposes on this issue.

8 I'm a little concerned that we are now getting into
9 potentially confusing -- if not prejudicial, certainly
10 confusing -- minutia that detracts from their focus. It is
11 really a 403 issue as far as I'm concerned, not a 401 issue.

12 I come back to what is 403. I have to balance the
13 relevance against the prejudicial or confusing aspects. What
14 is there in this that hasn't already been covered?

15 MR. EDERER: The other point, your Honor, is that this
16 document, in particular Defense Exhibit 82, and the responses
17 to the questions deals with an issue of valuation that was also
18 raised on direct examination.

19 THE COURT: Where is that?

20 MR. EDERER: Question and answer number 7 on the
21 second page of the exhibit.

22 THE COURT: Hang on a minute. First of all, it is not
23 even the final deal. Putting aside that, I'm not quite sure
24 what the relevance is. You need to spell it out for me a
25 little more clearly.

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1 MR. EDERER: The valuation of the patents was
2 something that their damages expert also took into account in
3 his damages report. There is an inconsistency between the
4 numbers that appear in the financial statements of the company
5 and the numbers that appear here.

6 THE COURT: This is dealing with the valuation of the
7 company.

8 MR. EDERER: Yes.

9 THE COURT: As a whole, right?

10 MR. EDERER: Yes.

11 THE COURT: Your expert or their expert or both
12 experts are only concerned with the valuation of the particular
13 patents and claims here involved, right?

14 MR. EDERER: Yes.

15 THE COURT: I think this is somewhat of apples and
16 oranges.

17 MR. EDERER: Fair enough, your Honor.

18 THE COURT: Very good. How much more do you have
19 roughly on cross?

20 MR. EDERER: Half an hour.

21 THE COURT: I think that would be appropriate. I
22 think any more would be overkill. Who is the second witness?

23 MR. CABRAL: Your Honor, that is an issue we wanted to
24 address with you. The second live witness available is Eugene
25 Shteyn, who appears third on the list. The second on our

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1 witness list is John Hendricks, who is not available to testify
2 live. The parties have agreed to show the videotape of his
3 deposition subject to the Court's rulings on limited
4 objections.

5 THE COURT: When I said no deposition, what I meant is
6 that if either party had been able to call a witness live, then
7 he would be called live, because live testimony is always
8 preferable to deposition testimony. Why is he not available,
9 other than technically? Why is he not available? I thought he
10 was associated with the plaintiff.

11 MR. CABRAL: He is an inventor, a retired chairman of
12 Discovery Communications. I don't have specific information
13 regarding his unavailability. I know he is outside of our
14 ability to bring him to court.

15 THE COURT: I understand the technical objection.
16 Discovery is a one-quarter owner of ADREA, right?

17 MR. CABRAL: That's correct.

18 THE COURT: He was the former honcho of Discovery, is
19 that correct?

20 MR. CABRAL: My understanding is he is no longer
21 associated with Discovery.

22 THE COURT: When did he retire?

23 MR. CABRAL: That's a good question. I don't have a
24 specific date for your Honor.

25 THE COURT: Has anyone asked him if he would come

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1 testify?

2 MR. CABRAL: We did inquire of that, your Honor.

3 THE COURT: Of whom? Of him personally?

4 MR. CABRAL: Of attorneys representing his interest,
5 your Honor.

6 THE COURT: Attorneys representing?

7 MR. CABRAL: Representing his interest, your Honor.

8 THE COURT: Representing his interest?

9 MR. CABRAL: That's right, and that of Discovery as
10 well.

11 THE COURT: Interest, shminterest, as they would say.
12 Do you have a phone number for him?

13 MR. CABRAL: I do not, your Honor. I believe we have
14 reached out to him personally as well.

15 THE COURT: I don't know what representing his
16 interest means. Unless he is represented personally by
17 counsel, someone ought to call him up and say that it would be
18 much more helpful to the jury to hear from him in person than
19 by deposition.

20 MR. BAUER: Your Honor, the company's representative,
21 Mr. Rainey, knows the personal details. He can address that.

22 THE COURT: All right.

23 MR. RAINEY: We reached out to Mr. Hendricks. Not
24 only did he say that he was unavailable, out of the country,
25 but also his personal attorney made the same representation

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1 when we tried once again to get him.

2 THE COURT: Who is his personal attorney?

3 MR. RAINEY: It was a woman, and I don't remember her
4 name.

5 THE COURT: I want to speak with him by phone
6 tomorrow. Get me the name and phone number by 9 o'clock
7 tomorrow. All right?

8 MR. RAINEY: Yes.

9 THE COURT: Assuming he is not available, you want to
10 play that deposition.

11 MR. CABRAL: That's correct, your Honor.

12 THE COURT: How long will that take?

13 MR. CABRAL: Right now the video with both parties'
14 designations is approximately one hour. If your Honor were to
15 rule on the objections, it would be shorter than that.

16 THE COURT: I'm sorry, I didn't know that was one of
17 the ones that was before me for rulings. I will have my law
18 clerk pull it out. I don't think I can get you those rulings
19 until tomorrow morning, because I teach at Columbia tonight.
20 We will put that off till later in the day. You should have
21 witness number three available to testify right after this
22 witness. Then I'll try to get you those rulings by certainly
23 no later than the beginning of the lunch hour so you can adjust
24 the video accordingly.

25 MR. CABRAL: That should be fine, your Honor. One

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1 other issue, just to give the Court notice. The only other
2 issue regarding unavailability of a witness is Sudeep Narain,
3 who also appears relatively early on the witness list. He is a
4 former Barnes & Noble employee who is not going to be able to
5 testify live.

6 THE COURT: Also outside the jurisdiction?

7 MR. CABRAL: Yes, your Honor.

8 THE COURT: What is his reason?

9 MR. CABRAL: For that you would have to ask Barnes &
10 Noble.

11 THE COURT: I am asking Barnes & Noble.

12 MR. SHARIFAHMADIAN: Your Honor, he is no longer
13 employed by Barnes & Noble.

14 THE COURT: So what? I understand you don't control
15 him. How long was he an employee?

16 MR. SHARIFAHMADIAN: How long was he?

17 THE COURT: How long was he an employee, yes.

18 MR. SHARIFAHMADIAN: I believe he was an employee for
19 a couple of years.

20 THE COURT: Just a couple of years?

21 MR. SHARIFAHMADIAN: Yes.

22 THE COURT: What is he doing now?

23 MR. SHARIFAHMADIAN: He is in another venture. I
24 don't know the name of it.

25 THE COURT: Do you know where it is?

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1 MR. SHARIFAHMADIAN: He is in California.

2 THE COURT: Did anyone ask him whether he would be
3 willing to testify -- I'm not sure I want to do this -- by
4 video conference?

5 MR. SHARIFAHMADIAN: We did not put the video
6 conference out to him, your Honor.

7 THE COURT: Did you contact him personally?

8 MR. SHARIFAHMADIAN: I did not personally speak to
9 him, no.

10 THE COURT: Who spoke to him personally?

11 MR. SHARIFAHMADIAN: I believe representatives of
12 Barnes & Noble.

13 THE COURT: Why don't you talk to him personally and
14 tell him that of course you would be thrilled, as I know you
15 would, to pay his expenses and how can he pass up coming to a
16 city that has rain. Explain to him more seriously that the
17 jury system functions much better when we have live testimony
18 rather than videotape deposition testimony.

19 I don't have the power to force anyone and I'm not
20 going to try to twist their arms, but my experience has been
21 that, believe it or not, there are a lot of good citizens out
22 there who are quite responsive to the suggestion that they will
23 be doing a public service to a jury of peers if they will
24 appear in person, at some modest inconvenience to them but with
25 every attempt to moderate that inconvenience so that the jury

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1 could have a chance to hear and see them first-hand and not
2 have to rely on something indirect.

3 Not everyone is responsive to that. I can well
4 imagine that some -- what was he, CEO of Discovery?

5 MR. CABRAL: He was the former chairman.

6 THE COURT: Corporate chairman. Now he is off and no
7 longer in the country, is that the information?

8 MR. CABRAL: Your Honor, unfortunately, I don't know
9 his personal circumstances.

10 THE COURT: How can I possibly expect someone like
11 that to respond to a request in the interests of justice and
12 public service? But maybe he will.

13 MR. CABRAL: The extent of my knowledge is that he is
14 out of the country, your Honor.

15 THE COURT: Maybe your former employee would as well.
16 Let's give it a try, gentlemen.

17 See you tomorrow at 9 o'clock.

18 MR. BERTA: Your Honor, there has been an issue with
19 respect to witness ORDER.

20 THE COURT: We will take that up tomorrow. I have
21 another matter that is 15 minutes late right now.

22 (Adjourned to 9:00 a.m., October 8, 2014)

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